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Wisconsin Supreme Court

WISCONSIN REPORTS

123

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

OCTOBER 18, 1904—JANUARY 31, 1905.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
JOSHUA ERIC DODGE,
ROBERT G. SIEBECKER,
JAMES C. KERWIN,
(After January 2, 1905).

Attorney General, - L. M. STURDEVANT,

Clerk, - - - CLARENCE KELLOGG.

MEMORANDUM.

Mr. Justice KERWIN, who became a member of the court on January 2, 1905, took no part in the decision of any of the cases reported in this volume.

ERROR NOTED IN PREVIOUS VOLUME.

VOL. 122.

Page 572, line —4. For limita-, read limitation.

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PRESENTATION PROCEEDINGS.

PORTRAIT OF JUDGE SAMUEL CRAWFORD

On the 17th day of November, 1904, Mr. Calvert Spensley of Mineral Point addressed the court as follows:

May it please the Court:—It having become known that the members of the bar of the Fifth judicial circuit were contemplating procuring and presenting to this court a portrait of SAMUEL CRAWFORD, deceased, ex-justice of this court, to be hung in this court room with those of the other deceased distinguished members of this court, Mrs. L. H. Bancroft of Richland Center very kindly agreed to copy an oil painting of Justice CRAWFORD which was painted by the distinguished artist Stuart of New York at the time Justice CRAWFORD sat on this bench. She has completed the task so unselfishly undertaken by her, and in a manner so thoroughly acceptable that it is difficult to distinguish the copy from the original.

The members of the bar of the Fifth circuit have assigned to me the pleasant duty of presenting the portrait to this court. And in doing so, I desire, on behalf of the members of that bar, to express to Mrs. Bancroft, who is now present in court, our deep sense of obligation to her for her kindness in furnishing the portrait without fee or hope of reward, and to say to her that we shall hereafter consider her an honorary member of our bar.

Judge SAMUEL CRAWFORD was born at Ballibay, in the county of Monahan, Ireland, April 20, 1820. His father was a merchant, and gave him an excellent education and careful training. He came to the United States in 1840, and studied law for a time at Warwick, Orange county, New York. About the year 1841 he came to Galena, Illinois, then the commercial metropolis of the great Northwest, with his brothers Stewart Crawford and John Crawford, one of whom was a druggist and the other a physician. Both of them made Galena their home, were successful business men, and died there.

For a time Judge CRAWFORD worked at some mechanical trade, and then resumed the study of the law in the office of J. M. Douglas, a prominent lawyer at Galena, who was afterwards president of the Illinois Central Railroad.

Portrait of Judge Samuel Crawford.

Some of the most eminent lawyers of the county were practitioners there; among them were Judge Drummond, M. Y. Johnson (who was during the War of the Rebellion confined in Fort La-Fayette in New York harbor for disloyal utterances against the government), and others of equal rank. It was at such a bar that young CRAWFORD received his legal experience and training, which no doubt had much to do with his future success at the bar and eminence on the bench.

At that time the mining interests about Benton, New Diggings, and Shullsburg, in LaFayette county, were of great value, and much litigation grew out of conflicting mining claims.

Judge CRAWFORD, after having been admitted to the bar at Galena in the year 1844, located at New Diggings, and immediately secured a large practice. His ability as a lawyer, and especially as an advocate, attracted the attention of Francis Dunn, a brother of the late Judge CHARLES DUNN, who was then altogether the most distinguished member of the bar in southwestern Wisconsin. He invited Judge CRAWFORD to locate in Mineral Point and form a law partnership with him and David W. Jones, a brother-in-law of the Dunns, and afterwards secretary of the state of Wisconsin. That copartnership did an immense law business, and continued until Francis Dunn went to California in 1850. From that time Judge CRAWFORD had no law partner and practiced his profession in the Fifth and adjoining circuits, in the supreme court of the state, and in the United States courts. His practice, especially in mining and criminal cases, was lucrative and extensive.

In 1848 he was married to Miss Jane Sweet, a woman of great refinement and culture, by whom he had four children, two of whom, Mrs. W. S. Ross of Mineral Point and John Crawford of Galena, still survive. His married life was a most happy one.

When the separate supreme court provided for in the constitution of the state was organized, he was elected one of its members. Under the law creating that court the two associate justices, Judge ABRAM D. SMITH and Judge CRAWFORD, drew lots for the long and short terms. Judge CRAWFORD was unfortunate in the drawing and was awarded the short term, which, under the language of the law organizing the court, expired May 31, 1855. Judge COLE succeeded Judge CRAWFORD on the bench of this court on the 1st of June, 1855. It was afterwards determined that Judge CRAWFORD'S term, under the constitution of the state, did not expire until January 1, 1856, and he was awarded the salary of the office from June 1, 1855. to January 1, 1856, although Judge COLE as *de facto* judge occupied a seat on the bench during that time and also drew the salary.

Judge CRAWFORD sat on the bench during the June and December terms in 1853, the June term, 1854, and also the December term,

Portrait of Judge Samuel Crawford.

1854, although the Reports show that only one case was decided during the latter term, which is found in vol. 4 of the Wisconsin Reports. The decision in that case is by Judge CRAWFORD. His other decisions are in the first three volumes of the Wisconsin Reports. His opinions show great care in their preparation, that he was well grounded in the elementary principles of law, and that he was a careful and painstaking judge. This might be expected from his thorough early legal training. These opinions have stood the test of fifty years' time unusually well, and a great majority of them are the law of this court today. He appears to have written but one dissenting opinion, viz: *In re Sherman M. Booth*, reported in 3d Wisconsin, and this dissenting opinion cost him his re-election to the bench. When he stood for re-election in 1855 his views in regard to the power of Congress to legislate in regard to fugitive slaves, as expressed in his dissenting opinion in that case, although generally sound, were not at the time popular in this state, and he was defeated by Judge COLE, who came from the same part of the state as Judge CRAWFORD. He had the confidence and esteem of his party, however, and was nominated by it for Congress against the late Governor Washburn in 1856, and in 1859 he was nominated as the candidate of his party for the office of attorney general, but was defeated for both offices with his party.

After his retirement from the bench he spent some time in Madison practicing before this court, and then opened a law office again in Mineral Point, which was then the county seat of Iowa county, and continued to practice his profession there until his death. While engaged at Mineral Point in assisting the district attorney of LaFayette county in the prosecution of a murder case on change of venue from LaFayette county, in February, 1860, just before the close of the testimony, he was taken suddenly ill in court. He was removed to his home and died in a few days afterwards on the 28th of February, 1860,—literally dying in the legal harness.

Judge CRAWFORD was a most genial and accomplished gentleman, chivalrous in his disposition, and of the strictest honor and integrity. He had a heart full of warm sympathies and generous impulses, and as a man and citizen was greatly beloved. He was a fine-looking man, was affable and pleasant to all, possessed a large fund of general information, was well read in literature, especially poetry, was entertaining in conversation, and was what at the present time would be called a "good mixer."

Although a strict party man, he was a firm believer in the indestructible union of the states, and had his life been spared until the breaking out of the War of the Rebellion, I have no doubt that he would have been found with Douglas, Matt. Carpenter, and other leading Democrats, strongly supporting the Union cause.

Portrait of Judge Samuel Crawford.

With his natural ability, wide reputation as an orator, lawyer, and judge, and great popularity with the people, there can be no doubt that, if his life had been spared, he would have risen to great eminence in the nation; and we can but feel that his untimely taking off in the full blush and development of his powers was a great misfortune to the nation.

His memory has always been held in great esteem and reverence by the members of the bar of his circuit. No greater evidence of this can be found than in the great unanimity with which the members of that bar, so long after his death, have joined in making the presentation of his portrait to this court.

He honored the bar at which he practiced, and added much to its fame, and adorned and helped give the high standing to this court which it has ever since maintained.

The members of the bar at which he practiced desire to honor his memory, and think that no greater distinction can be awarded him than that his faithful portrait should have a perpetual place with those of the other eminent judges who have served with distinction on this bench and given it the high place it has always held in the confidence and esteem, not only of the members of the bar of this state, but also in the estimation of its sister courts.

On behalf of the members of the bar of the Fifth judicial circuit, I ask that this court receive this portrait into its care and keeping.

Mr. Chief Justice CASSODAY, on behalf of the court, responded:

Mr. CRAWFORD ceased to be a member of this court at the early age of thirty-five—in June, 1855—two years before I came to the state. He died in February, 1860. He is the only member of this court with whom I never had any personal acquaintance. His written opinions are contained in the first four volumes of the Wisconsin Reports. They are well written, clearly expressed, and dignified in manner, and reflect credit upon the court, especially in view of the fact that he occupied the bench but two years and that the court, during the time, was practically without precedents of its own making.

In behalf of this court, I return thanks to the bar of the Fifth circuit, and all who have contributed to the presentation made, to preserve the memory of one of the first members of this court, as separately organized, fifty-one years ago last June. It will have its appropriate place.

Only two paintings now are absent, which I trust will soon be supplied. These proceedings will be entered of record and published in the Reports.

CASES DETERMINED

AT THE

August Term, 1904.

NORTHERN SUPPLY COMPANY, Appellant, vs. WANGARD, Respondent.

September 27—October 18, 1904.

Pleading: Waiver of reply to counterclaim: Sales: Written contract: Warranties: Representations by agent: Delivery of defective goods: Damages: Special verdict: Diligence to prevent loss: Evidence: Opinions: Instructions to jury.

1. Where a defendant treated the allegations of his counterclaim as at issue by proceeding with the trial until the close of the evidence before suggesting that there was no reply, he thereby waived the objection.
2. Under a written contract plaintiff sold defendant, a retail grocer, a quantity of "good" potatoes. *Held*, that this called for potatoes of good merchantable quality having at least ordinary keeping qualities, but that there was no implied warranty that they would be fit for the purpose for which they were bought, the only warranty being that the potatoes delivered in execution of the contract were free from latent defects rendering them not such potatoes as the contract called for.
3. A contract of sale being in writing and containing no express warranty, the question whether the vendor's agent who made the contract had authority to bind his principal by warranty is immaterial.
4. So, also, the question whether certain representations, claimed to have been made by the agent at the time the contract was made, were statements of fact or mere expressions of opinion, is immaterial.
5. Upon a sale of "good" potatoes to a retail grocer, known to be such by the vendor, the latter was chargeable with knowledge

of the probability that the potatoes sold would be mixed with others and, if liable soon to decay, would injure such others, and may therefore be held liable for such injury to the vendee's other potatoes resulting from breach of the contract in delivering potatoes which were not such as the contract called for.

6. In such a case the vendee cannot complain of a verdict finding that fifty bushels of other potatoes were spoiled by mingling those sold with them, on the ground that the undisputed evidence showed that seventy-five bushels were so spoiled.
7. A question submitted in a special verdict, "Were all the potatoes furnished by the plaintiff to the defendant of the kind and quality agreed to be furnished?" was not multifarious.
8. The vendee's general damages for breach of the contract by delivery of potatoes which were not such as the contract called for are limited to the difference between the market value of those delivered, at the time and place of delivery, and the value they would have possessed had they been according to contract; and a special verdict which fails to find such market value of those delivered or such difference is fatally defective.
9. A finding of the jury charging the vendor with the entire responsibility for the destruction of the potatoes sold and also of other potatoes with which they were placed in the vendee's cellar, is *held* inconsistent with the undisputed evidence that after the vendee had discovered the rotting condition of the new potatoes he made no attempt to remove them or to save the old ones, except as a few were picked out from time to time for his retail trade, until the entire lot became a decayed and worthless mass.
10. The vendor is not chargeable in such a case with any loss which the vendee could by the exercise of ordinary care have prevented.
11. The vendee, as soon as he discovered that the new potatoes were rapidly decaying, should have removed them from the cellar and saved the old potatoes, and might recover the reasonable cost of so doing; but he was not entitled to recover the cost of sorting over a few occasionally for his retail trade and of removing the rotten mass that remained.
12. Evidence as to the best method of handling potatoes found to be rapidly decaying was not immaterial, but had a bearing upon the question whether the vendee had exercised ordinary care to prevent loss.
13. The question whether the potatoes when delivered by the vendor at the agreed place were of good, sound, white stock

was a proper one for opinion evidence, but under the written contract in this case, calling only for "good" potatoes, was immaterial.

14. So, also, under the contract, the question as to what kind of soil the potatoes were grown in was immaterial.

15. Upon the question whether the vendor knew, at the time of the sale, the purpose for which the potatoes were purchased, it was proper to instruct the jury that knowledge of the vendor's agent who made the sale was imputable to the vendor, and language, in that connection, to the effect that acts, statements, and knowledge of the agent when the contract was made were binding on the vendor, is *held* not likely to have misled the jury to understand that the vendor was bound by unauthorized warranties made by the agent.

16. An instruction permitting the jury to apply their own knowledge and experience in determining what the evidence established upon a question of fact, was erroneous.

17. Upon the question whether a person of ordinary intelligence in the exercise of ordinary care, by inspecting potatoes after their arrival and before their removal from the car, could have determined whether they were of the kind and quality agreed upon, an instruction that "he would not be required to look at the whole mass in the car or look at them other than in a fair and reasonable way," etc., is *held* to invade the province of the jury.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Action to recover for a car of potatoes sold by plaintiff to defendant free on board cars at Tomahawk, Wisconsin, shipment to be made from a point elsewhere.

The complaint was in the usual form of a declaration on contract to recover for property sold and delivered at an agreed price. As it was amended on the trial, the amount claimed was $186, the price of 600 bushels of potatoes at 31 cents per bushel, less $41.80, paid thereon. The defendant admitted making a contract with plaintiff for the potatoes and the pretended execution thereof by delivery of the potatoes mentioned in the complaint, but alleged the following facts for a defense and counterclaim: The potatoes were sold under an agreement, providing for delivery at Tomahawk,

freight paid, of potatoes of good, sound, white stock, suitable for the plaintiff's business, and that would keep well. The potatoes were not of the kind or quality agreed upon. They were not raised on sand and were not sound when shipped, or good white stock, but were defective and worthless. Plaintiff knew when the potatoes were purchased the particular purpose for which they were designed, and that those sent were worthless therefor. Defendant received the potatoes, relying on the agreement aforesaid, paying $36.07, freight thereon. The defects in the potatoes were of a character not observable by ordinary attention thereto. As soon as the potatoes were received defendant commenced selling them by retail. Complaint was soon made by customers that they were defective and not fit for use, whereupon defendant notified plaintiff, with the result that it refused to receive back the property or concern itself at all in respect thereto. By reason of the defective condition of the potatoes it became necessary to assort them at an expense of $25, to the defendant's damage in such sum. He placed the potatoes, before knowing of their condition, in his cellar upon about seventy-five bushels of good potatoes, which were in consequence destroyed, to his damage in the sum of $30. In the course of thirty days after the potatoes were put in his cellar, by reason of their condition, defendant was obliged to remove them therefrom and throw the same away, to his damage for such removal in the sum of $13. Potatoes of the quality contracted for when those in question were received were worth 35 cents per bushel, or $210 for 600 bushels, while those delivered were not worth to exceed $60, to the defendant's damage in the sum of $150. Judgment was prayed for such several sums.

The cause was commenced in justice's court and carried to the circuit court by appeal. Some amendments to the complaint and to the answer were there allowed. No reply was interposed. Such amendments did not materially change the aspects of the case, as before indicated. There was

evidence on the trial to the effect that defendant was a retail grocer; that he and plaintiff's agent, at the former's store in Tomahawk, had some negotiations respecting the sale of potatoes by the latter to the former, during which the agent represented that plaintiff could furnish good, sound white stock, raised on sand and that would keep all winter, and that upon such representations defendant agreed to take 400 bushels or more of such stock. There was further evidence to the effect that as a result of the negotiations a memorandum of the agreement entered into was made in these words:

"Dated October 6th, 1900.
N. S. Co., Amery.
Ship to *A. Wangard,*
At Tomahawk, Wis.
How ship—When—.
Terms—
400 bush. s'k'd potatoes or more, 31c.
Will order out.
"F. LANGENBACH."

—Such memorandum being made in triplicate, and one left with the defendant, one sent to plaintiff, and one retained by the agent. There was further evidence that pursuant to the condition indicated by the words "will order out" the potatoes were not to be sent till a communication was made in writing from the defendant to the plaintiff in these words:

"Tomahawk, Wis., Oct. 11, 1900.

"Dear Sir:— . . . You can send me 600 bushels of potatoes and one or two tons of ground corn and oats.

"Yours truly, A. WANGARD."

"I want good potatoes. . . . If you can put more than 600 bushels of potatoes, I wish you would fill the car as big as you can."

There was further evidence as follows: Pursuant to such communication the potatoes in question were sent and in due course of time arrived at Tomahawk. The freight was

paid by the defendant and potatoes received into his possession. When they arrived, though they were defective and not such as those agreed upon, the defects were not discoverable by the exercise of ordinary attention to the matter, nor until after the potatoes were placed in defendant's cellar. They were so placed and on top of about seventy-five bushels of good potatoes. About two or three days thereafter, it being suggested by customers to whom some of the potatoes had been sold that they were not suitable for use, those remaining in the cellar were examined and found to be very defective, and in no sense such as plaintiff agreed to deliver. Thereupon plaintiff was notified that the potatoes would not be accepted in satisfaction of the contract. Thereafter, from time to time, small portions of the potatoes were assorted in order to obtain those which were salable, to satisfy the wants of customers dealing at the defendant's store. The potatoes were handled in that manner for some three weeks. At the end of that time those which remained had become a mass of decayed and filthy matter and entirely worthless. Shortly thereafter such decayed mass, which included the remnants of the potatoes purchased and of the seventy-five bushels, which were in the cellar when the former were placed therein as aforesaid, was removed and cast away. The cellar at this time was in a very filthy condition. Water from the decayed mass had accumulated therein to a considerable extent, and the odor therefrom so tainted the atmosphere in the store above that customers would hardly venture therein. Proof was further made of the cost of removing the decayed mass as aforesaid, of the amount of salable potatoes that were secured, and of the value of such potatoes as those contracted for at the time of the delivery. Such further reference to the facts as may be necessary to the treatment of this case will be found in the opinion.

At the close of the evidence defendant moved for judgment upon the ground that no reply was made to the counterclaim

contained in the answer. The motion was denied. The cause was then submitted to the jury for a special verdict. Such exceptions taken to the interrogatories composing the same and the instructions given in respect thereto as seem to be necessary to an understanding of the question, are discussed in the opinion. The jury found in substance, as follows:

The plaintiff and defendant bargained for the sale of 600 bushels of potatoes, to be delivered by the former to the latter on board cars at Tomahawk at thirty-one cents per bushel. Plaintiff knew the purpose for which the defendant purchased the potatoes. It was not agreed that the defendant should inspect the potatoes before removing the same from the car, and then reject them if not found satisfactory. A person of ordinary care could not by ordinary attention to the matter have discovered by inspecting the potatoes at the time they arrived at Tomahawk, before removing them from the car, that they were not according to the agreement. Two hundred bushels only of the potatoes delivered were according to contract. None of the potatoes spoiled after the receipt thereof by defendant as the direct and natural consequence of his not properly caring therefor. Four hundred bushels of the potatoes spoiled as a direct natural consequence of defects existing therein at the time of the delivery to defendant. The wholesale market price of such potatoes as those agreed upon, at the time the delivery was made, was thirty-one cents per bushel. The reasonable expense of removing the rotten potatoes from the cellar was $13, and of assorting the potatoes $10. Fifty bushels of good potatoes, which were in the cellar when the potatoes in question were received and placed therein, were spoiled as the direct and natural consequence of such placing. Notice was seasonably given to plaintiff that the potatoes would not be accepted as conforming to their agreement.

After the coming in of the verdict there was a motion to set the same aside, and for a new trial, which was denied. Judgment was thereupon entered and plaintiff appealed therefrom.

The judgment entered, as ordered by the trial court, upon the special verdict was in favor of the defendant for $18.27 and costs.

For the appellant there were briefs by *A. H. Woodworth,* attorney, and *Reid, Smart & Curtis,* of counsel, and oral argument by *E. M. Smart.*

For the respondent there was a brief by *G. M. Sheldon,* attorney, and *Flett & Porter,* of counsel, and oral argument by *Mr. Sheldon.*

Marshall, J. Respondent's counsel contend that the assignments of error to impeach the judgment cannot properly affect it since there was no reply to the counterclaim contained in the answer, and respondent was therefore entitled to the judgment obtained on the pleadings. If a reply were required, under the circumstances, in order to put the allegations constituting the counterclaim in issue, it was effectually waived by respondent's treating the same as at issue by going to trial upon the merits, and proceeding therein till near the close thereof before suggesting anything to the contrary. *Killman v. Gregory,* 91 Wis. 478, 65 N. W. 53; 18 Ency. Pl. & Pr. 650.

Appellant contends that the judgment is not sustained by the verdict for several reasons, which will be considered:

(a) The verdict and judgment are based on express warranty and one essential fact to sustain that, since it is undisputed that the contract on appellant's part was made by its agent, was neither found by the jury, nor was there any evidence on the question, such fact being that such agent had authority to bind his principal by warranty.

Westurn v. Page, 94 Wis. 251, 68 N. W. 1003, and *Waupaca E. L. & R. Co. v. Milwaukee E. R. & L. Co.* 112 Wis. Wis. 469, 88 N. W. 308, support counsel's proposition as to the law, but it does not apply to this case, because the contract here was in writing, contained no express warranty, and

the cause was not properly treatable upon the theory that there was such.

(b) The jury should have been required to determine whether certain representations claimed to have been made by the agent at the time the contract was entered into, were statements of fact or mere expressions of opinion.

We fail to see any application of the law touching that subject to this case. Since the contract between the parties was in writing, as before indicated, evidence as to what was said at the time of the making thereof, or prior thereto, or as to what was intended by the parties, or any oral evidence as to the terms of the agreement, or finding in respect thereto, independently of the writing, was immaterial. That seems to have been overlooked all through the trial. The failure to appreciate it needlessly complicated what would have otherwise been a very simple case. The sole source of information as to the terms of the contract is the memorandum of December 6, 1900, indicating that appellant agreed to sell to the respondent and ship to him as ordered, at Tomahawk, Wisconsin, 400 bushels "s'k'd" potatoes, or more, at thirty-one cents per bushel, and respondent's letter, dated October 11th thereafter, addressed to the appellant and directing it to ship 600 bushels of good potatoes.

(c) There is no finding that the potatoes were not reasonably fit for the purpose for which they were bought, nor that any particular quantity of old potatoes was destroyed because the new ones were not suitable for such use.

No such finding was necessary. Counsel for appellant seem to think because the breach of contract found by the jury was that the potatoes delivered were not such as the agreement called for, that it entirely failed to make out a breach of implied warranty; that such warranty, if any existed, was that the potatoes should be reasonably fit for the purpose for which they were bought. In that counsel confuse

the implied warranty, which often exists, that an article sold for a particular purpose known to the vendor at the time of the sale, is reasonably fit for such purpose, with the implied warranty that an article delivered in consummation of an executory contract is of the kind agreed upon, as regards imperfections not discoverable at the time of the reception thereof by ordinary attention thereto on the part of the purchaser. The latter is the warranty which respondent was entitled to recover on in this case, if entitled to recover at all.

(d) The jury should have been requested to find as a fact whether there was an implied warranty of fitness that the property delivered was reasonably suitable for the use such property was intended for.

Here again counsel fail to appreciate that no such warranty was involved in the case; that the only warranty there was, if any, was against defects not permissible by the contract which were not discoverable by ordinary attention on the part of the purchaser, as before stated.

The sufficiency of the verdict is otherwise challenged as will be hereafter shown.

The next assignment of error is that the finding in the special verdict, that the loss of the good potatoes, which respondent had when the new ones were received and placed therewith, was the direct and natural consequence of the breach of warranty complained of, did not justify, in any event, a recovery for such loss because there was no finding nor any evidence, that special circumstances existed known to the appellant when the contract was made from which it should reasonably have apprehended that such loss was liable to occur by its breach of contract. It seems to us otherwise. The evidence was undisputed that appellant knew respondent was a retail grocer. Therefore it must have apprehended at the time the contract was made that the placing of the new potatoes with old ones was within the probabilities. Further, as a matter of common experience, appellant must have

known that the mixing of potatoes that were liable to soon decay, with good ones, would probably result in injuring the latter. So all the essentials of the rule necessary to charge appellant with the damages to the old potatoes to the extent that they are attributable to the breach of contract complained of, were satisfied. True, appellant was not chargeable with any damages other than such as "may reasonably be supposed to have been in the contemplation of both parties when the contract was made as the probable result of the breach of it" (*Hadley v. Baxendale,* 9 Exch. 341, as condensed and approved by this court in *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 11 N. W. 356, 911), and that special circumstances enhancing the damages that would ordinarily occur must always be brought home to the knowledge of the person charged therewith as of the time the contract was entered into, or the sufferer will be left remediless therefor (*Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119); but that was all satisfied in this case as to the loss of the old potatoes, as we have seen.

Further complaint is made that, since the evidence was undisputed and all one way that all of the seventy-five bushels of old potatoes was destroyed by reason of the new ones being placed thereon, the verdict that only fifty bushels were so lost was based on mere conjecture. We are unable to see why complaint should be made by the appellant because the jury erroneously found against it for a less loss than the whole of the old potatoes by reason of the contact thereof with the new ones, when the evidence was undisputed that all were so lost, if any were. Probably counsel for respondent would readily have consented to an amendment of the verdict in that respect. *Hickey v. C., M. & St. P. R. Co.* 64 Wis. 649, 26 N. W. 112, condemning a verdict based on conjecture, so far as we can see, has no application here. There it was clear that the verdict was a mere prejudicial guess, while at the best, here, all that is claimed is that the jury found against

appellant for a loss less than that which the undisputed evidence established.

Did the court err in submitting to the jury this question, "Were all the potatoes, furnished by the plaintiff to the defendant, of the kind and quality agreed to be furnished?" It is insisted that such question was fatally defective because multifarious. We shall not follow the ingenious argument of counsel in support of that propostion to show what appears to us to be its obvious infirmity. The difficulty therewith, in the main, grows out of want of appreciation that respondent's claim was based wholly on breach of implied warranty that the potatoes delivered in execution of the written contract were free from latent defects rendering them not such potatoes as the contract called for. There was no need for any finding as to the terms of the contract, nor any finding as to the scope of the implied warranty. The former was in writing, the latter was a matter of law. The simple proposition submitted in the question, quoted, seems to be free from multifariousness by the most severe test that could be reasonably applied thereto.

The next assignment of error is, in effect, that the verdict is fatally defective for want of any finding of damages on a recoverable basis, or of facts of an evidentiary character from which the ultimate fact in that regard can be determined as a necessary conclusion. We see no escape from that contention. Respondent's general damages were limited to the difference between the market value of the property delivered at the time and place of the delivery, and the value at such time and place the same would have possessed had it been according to the contract. *Aultman & T. Co. v. Hetherington,* 42 Wis. 622. There was no direct evidence on that point, nor was there any finding directly thereon. The finding that the potatoes were not all according to contract; that 200 bushels were; that 400 bushels thereof spoiled in consequence of not being such as the contract called for; that such

potatoes as were so called for, at the time and place for the delivery thereof, were worth thirty-one cents per bushel; and that none of the potatoes were spoiled through fault on the part of the respondent, if supported by the evidence at all points, yet failed to establish, as a matter of law, the market value of the potatoes delivered at the time and place of the delivery. There should have been a specific finding on that point. It was a vital matter in the case. Why a question in respect thereto was not submitted to the jury, while a number of questions covering mere evidentiary matters were submitted together with a number of questions which were entirely unnecessary, in view of the fact that the contract between the parties was in writing, is not easy to understand. It might well be that 400 bushels of the potatoes delivered upon the contract spoiled during the course of four weeks after they were put into the respondent's cellar, and even without fault on his part, and yet that they were of some value when they were taken into his possession.

Complaint is made because the court refused to take a finding by the jury as to whether the appellant agreed that the potatoes would keep for any particular length of time. No such question was necessary since, as before indicated, the agreement was in writing, rendering all oral statements about the potatoes, at the time it was made, entirely immaterial.

The claim is made that the finding of the jury entirely freeing respondent from all responsibility for the destruction of either the old or the new potatoes, and charging appellant with the entire responsibility in the matter, is inconsistent in view of the undisputed evidence. It looks that way. The evidence shows that on the second or third day after the potatoes were placed in respondent's cellar he knew that they were dangerously defective and were liable soon to become entirely worthless; that he knew from day to day, after he first discovered such condition, that it was rapidly growing worse, yet that he made no attempt to remove the potatoes from the

cellar, or to save the seventy-five bushels of old ones, but allowed all to remain as they were when he first discovered the danger, except as potatoes were picked over from time to time to obtain a few good ones for his retail trade, till the entire lot became a decayed, filthy, and worthless mass of material. In the face of that, the jury exonerated respondent from all blame for the destruction of the potatoes, both old and new, and yet decided that such destruction was the natural and direct result of the condition the new potatoes were in when received by him. The fact that 400 bushels of the new potatoes spoiled after being placed in respondent's cellar was, as before indicated, only evidentiary of the value thereof when received. In no event could appellant be properly charged with such result unless it was one to be reasonably apprehended by both parties at the time of the making of the contract as a circumstance probable to occur from the breach of it. If appellant is chargeable with knowledge that respondent was liable to put the new potatoes with the old ones and that the end might probably be the destruction of both, certainly respondent is chargeable with such knowledge from the time he discovered the condition the new potatoes were in. With that in mind, the finding of the jury holding the former responsible for all that occurred after the new potatoes were placed in the cellar and exonerating the respondent from all fault, even for failing to make an effort to save the old potatoes from destruction and allowing the entire lot to remain in the cellar till it became a mass of filth, seems clearly absurd. It is considered that the findings by the jury, in view of the undisputed evidence, are inconsistent, and that the verdict exonerating respondent from all fault for the destruction of any of the potatoes is contrary to the evidence. That appellant is not chargeable with any loss which respondent could by the exercise of ordinary care have prevented, is elementary. *Fisk v. Tank,* 12 Wis. 276; *J. I. Case Plow Works v.*

Niles & Scott Co. 90 Wis. 590–606, 63 N. W. 1013; *Optenberg v. Skelton,* 109 Wis. 241–244, 85 N. W. 356.

It is contended that the finding as to the reasonable cost of assorting potatoes in the cellar and removing therefrom those which were rotten is not warranted by the evidence. Such finding was taken upon the theory that it was permissible for respondent to leave the potatoes in the cellar for several weeks, knowing they were rapidly becoming a mass of worthless material, and pay no attention thereto, other than to sort over a few now and then to obtain small quantities of sound ones to supply retail trade, and then charge appellant with the cost of such sorting and that of removing the rotten mass that remained. That was by no means the reasonable charge for sorting potatoes and removing those that were rotten, having regard to the special damages for which appellant was liable. Clearly as soon as it became apparent to respondent that the potatoes were rapidly decaying, which was in two or three days after they were received, he should have removed them from the cellar and saved the old potatoes. The reasonable cost of doing that would be the extent to which respondent could be said to have been damnified by the breach complained of. What that would have been the record is entirely silent.

Testimony was ruled out as immaterial concerning the best method of handling potatoes upon its being discovered that they are in the condition those in question were found to be in two or three days after respondent received them. Such evidence was certainly not immaterial. It, at least, bore directly on whether respondent exercised ordinary care to prevent any unnecessary loss accruing because of the breach complained of.

A witness, against objection, was permitted upon a hypothesis supposed to be warranted by the evidence, to give his opinion as to whether the potatoes when they arrived at the

agreed place for delivery were of good, sound, white stock. It is suggested that the subject involved in the question was not one proper to be established by opinion evidence. It seems otherwise. It may well be that the condition of potatoes at one time may tell a far different story as to their condition a short time prior thereto, to a person of more than ordinary experience in observing such matters than to one who is not. Any subject wherein a person may become specially learned, or skilled, is within the broad field of opinion evidence. *Daly v. Milwaukee,* 103 Wis. 588, 79 N. W. 752; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; 1 Wharton on Evidence, § 444. Such evidence is not confined to mere matters of professional or scientific knowledge. It extends to a very wide field, as an examination of the authorities in this court and elsewhere will readily show. *Leopold v. Van Kirk,* 29 Wis. 548; *Salvo v. Duncan,* 49 Wis. 151, 4 N. W. 1074; *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289; *Clason v. Milwaukee,* 30 Wis. 316; *Whitney v. C. & N. W. R. Co.* 27 Wis. 327; *Curtis v. C. & N. W. R. Co.* 18 Wis. 312; *Snyder v. W. U. R. Co.* 25 Wis. 60; *Griffin & S. Co. v. Joannes,* 80 Wis. 601, 50 N. W. 785. Whether a particular matter is or is not a proper subject for such evidence, and whether the witness presented is or is not competent to testify because of having special knowledge in respect thereto, is not always easy to determine. The questions in that regard, however, relate to mere competency, and, therefore, the trial judge's determination thereof, within all reasonable limits is supreme. We see no reason to overturn the judge's ruling in the instance before us upon the ground that the testimony was immaterial because the matter was not a proper subject for expert evidence. However, it was immaterial on another ground very clearly. The contract did not call for the kind of potatoes mentioned in the question. It merely called for good potatoes. Potatoes that were sound and reasonably good keepers, no doubt.

The court refused to permit appellant to prove what kind

of soil the potatoes were grown in. That was proper. The assignment of error in respect thereto was doubtless made by reason of counsel's overlooking the fact, often alluded to, that the written contract, not the conversation in relation thereto, governed the matter. There was nothing in the writing as to what kind of soil the potatoes should be the product of.

Complaint is made because, in respect to the interrogatory as to whether the plaintiff knew when the potatoes were sold the purpose for which they were purchased, the court instructed the jury that knowledge of plaintiff's agent in respect to the matter was imputable to the principal. The question was asked as one bearing on whether plaintiff had, at the time the contract was made, knowledge of special circumstances as regards how respondent would probably handle the potatoes, rendering it liable for special damages. It is conceded that as to such matter the instruction was proper. The court, however, used language to the effect that the acts, statements and knowledge of the agent when the contract was made were binding on the principal. It is said, that it informed the jury that plaintiff was bound by any warranty the agent may have made, though he was not specially authorized thereto by his principal. That may be, but there was no such warranty involved in the question, and it is not likely the jury understood the instruction to be broader than the subject to which it related, though it would be safer to use more guarded language.

The court instructed the jury on the question as to whether it was agreed that the potatoes should be examined when they arrived at Tomahawk and accepted or rejected before being taken from the car:

"You are to bring your own knowledge and experience in determining what the evidence and all the evidence and circumstances submitted for your consideration applicable to this question really establishes and means."

The question itself was out of place. The written contract made no mention of any such agreement, moreover the instruction, so far as it permitted the jury to apply to the matter any special knowledge of their own, was erroneous. That is according to elementary principles.

On the question as to whether a person of ordinary intelligence in the exercise of ordinary care, by inspecting the potatoes after they arrived at Tomahawk and before removing them from the car, could have determined whether they were the kind and quality agreed upon, the court instructed the jury in these words: "He would not be required to look at the whole mass in the car or look at them other than in a fair and reasonable way," etc. The complaint that the province of the jury was thereby invaded seems to be warranted. The nature of the inspection necessary to come up to the standard of ordinary care in the circumstances presented was wholly a subject for the jury to determine. Whether an examination sufficient to enable one to inform himself in a general way of the character of the entire car of potatoes may or may not have been required to come up to the necessary standard of care, was a jury question. There are but few situations where it is safe to instruct, as a matter of law, what is and what is not consistent with ordinary care.

Now we have specially or generally considered all of the assignments of error. Those that have not been named specifically are involved in and decided with those which are. The judgment must be reversed and the cause remanded for a new trial. It is hoped that when such trial shall occur only the case made by the pleadings in view of the undisputed fact, that the potatoes were purchased under a written contract, will be tried and submitted to the jury; that all extraneous matters will be excluded. The contract must be held to determine the question as to the kind of potatoes which were bought. They were simply good potatoes. That doubtless called for potatoes of good merchantable quality,

and that called for at least ordinary keeping qualities. When it comes to a question of damages it should not be forgotten, as to general damages, that the true standard for breach of implied warranty, as in a case of this kind, is the difference between the market value of the property delivered at the time and place it was received and the market value at such time and place of property of the kind the contract called for. In addition such special damages as are properly claimed in the pleading, established by the evidence, and allowable by correct legal principles as herein outlined, may be recovered. Further, it must be borne in mind upon a second trial that it was not consistent with ordinary care for respondent to allow the potatoes to remain in the cellar in contact with good stock, with knowledge of all the facts, till all the potatoes became a mass of filthy worthless material.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

WOLFGRAM, Appellant, vs. TOWN OF SCHOEPKE, Respondent.
SAME, Respondent, vs. SAME, Appellant.

September 27—October 18, 1904.

Appealable orders: New trial: Discretion: Imposing terms: Jurors: Verdict: When mistake can be shown.

1. Under sec. 3069, Stats. 1898, an order denying plaintiff's motion to correct a special verdict and enter judgment thereon in his favor is not appealable, and an appeal therefrom will be dismissed.
2. When a new trial is granted without the imposition of terms, it raises a presumption that the court deemed the verdict perverse, which is overcome if the record discloses some evidence to sustain the verdict.
3. In such case, unless there is an abuse of discretion, the order will be sustained, except in respect of the failure to impose terms.

4. The rule which excludes jurors' testimony as to their conduct in the proceedings involved in reaching and agreeing upon the verdict, does not exclude their evidence as to what really was the verdict agreed upon in order to prove that it has not been correctly expressed.
5. The rule which does not allow jurors to impeach their verdict, applies to the agreement which the jury reached, and not to the written paper filed, intended to express that agreement.
6. Where, in answering a question of a special verdict: Was plaintiff guilty of any want of ordinary care which contributed to the injury he received? the jury inserted the answer "Yes," the trial court may properly receive and consider the affidavits of all the jurors, to the effect that they all agreed that the plaintiff was not guilty of any want of ordinary care, and that the insertion of the answer "Yes" instead of "No" was a mistake, and justifies the exercise of discretion in awarding a new trial.
7. In such case, plaintiff having appealed to the court's discretion, it is error to grant a new trial without the imposition of terms.

Appeals from orders of the circuit court for Oneida county: W. C. Silverthorn, Circuit Judge. *Dismissed on plaintiff's appeal; reversed on that of defendant.*

Action for personal injuries from a hole in a country highway, left by the town authorities in original construction by merely covering the same with poles. Special verdict of twenty questions returned by jury, finding all material facts in favor of the plaintiff, except that question No. 16, "Was plaintiff guilty of any want of ordinary care which contributed to injury he received?" was answered "Yes." Plaintiff produced affidavits of all twelve jurors to the effect that all the jurors agreed that plaintiff was not guilty of any want of ordinary care, and that the insertion of the answer "Yes" instead of the word "No" was a mistake. The foreman, agreeing with these facts, states that he intended to write answer to the sixteenth question so as to find that said plaintiff was not guilty of any want of ordinary care which contributed to his injury. Upon these affidavits the plaintiff moved, first, that the answer "Yes" to the sixteenth question

be stricken out, and the answer "No" be inserted in lieu thereof, and for judgment upon the verdict as so amended, basing the request also on the contention that there was no evidence to sustain the affirmative answer to that question. That motion was denied, from which denial the plaintiff appeals.

Thereupon plaintiff moved on minutes and said affidavits for a new trial. Defendant moved to strike out jurors' affidavits. The court entered its order reciting that the motion was based on a mistake in the verdict and on the lack of support from evidence, whereby it denied defendant's motion to strike out said affidavits, "excepting that said affidavits be received and considered only as tending to show that there was a mistrial by reason of a mistake by the jury in writing the answer to question No. 16," but rejecting said affidavits in as far as they "tend, generally, to impeach or contradict said special verdict." The court entered further order granting plaintiff's motion to set aside the verdict and awarding a new trial, no costs being imposed on either party. From that order the defendant appeals.

For the plaintiff there was a brief by *John Barnes,* attorney, and *E. D. Minahan,* of counsel, and oral argument by *Mr. Barnes.*

A. W. Shelton, for the defendant.

Dodge, J. There can be no doubt that the order denying plaintiff's motion to correct the verdict and enter judgment in his favor is excluded from those which are appealable by sec. 3069, Stats. 1898. Its appealability is contended for under subd. 1 of that section, and, obviously, no other can have application. But, however much it may affect a substantial right, as pointed out in *Murphey v. Weil,* 86 Wis. 643, 57 N. W. 1112, it did not determine the action, nor prevent a judgment from which the plaintiff might have appealed. If the court committed error in refusing to amend the verdict

upon the affidavits of the jurors, that question plaintiff could have saved and brought before us for review upon an appeal from a judgment in favor of the defendant, which, doubtless, must have followed this verdict as it reads. The nonappealability of such an order is, however, settled by *Mills v. Conley,* 110 Wis. 525, 530, 86 N. W. 203. Counsel for plaintiff takes issue with one statement made in that case, however, to the effect that an appeal from a similar order was sustained in *Murphey v. Weil* under the fourth subdivision of sec. 3069, as it existed at that time, but not at the time of the appeal in *Mills v. Conley.* That subdivision gave an appeal from any order "when it involves the merits of an action or some part thereof." Counsel contends that appealability of the order in *Murphey v. Weil* was not predicated upon that subdivision, but upon subd. 1, because the court said that the order "affected a substantial right." This, however, was obviously no more than the use of the latter expression, albeit appearing in subd. 1 as an equivalent for that above quoted from subd. 4. If, however, *Murphey v. Weil* must, as plaintiff contends, be read to assert appealability of such an order under subd. 1, it is effectively overruled by *Mills v. Conley,* which is clearly correct, for subd. 1 does not give appealability to an order merely because it affects a substantial right, but only when it also, in effect, determines the action, and prevents a judgment from which an appeal might be taken. There is no escape from the conclusion that plaintiff's appeal must be dismissed.

Turning now to defendant's appeal from the order granting a new trial, we are confronted by the not unusual uncertainty as to the grounds on which it was awarded. That uncertainty is narrowed somewhat by the order itself, which declares the motion to have been urged, first, because of mistake in writing out answers to special verdict; and, secondly, because verdict was not supported by evidence. This second ground is still uncertain, for it is contended here, as also doubtless

below, both that there was no evidence of contributory negligence, and that the evidence so preponderates against such fact that the court should, in its discretion, have set aside a finding of contributory negligence. Doubtless we should solve this uncertainty in favor of the former ground because of the nonimposition of terms, which raises a presumption that the court deemed the verdict perverse, if that view is reasonably possible in light of the evidence; for when a new trial is granted in the field of discretion it is so far in the nature of a favor to the moving party that the trial court should impose some reasonable terms as a condition. *Mills v. Conley,* 110 Wis. 530, 86 N. W. 203; *Port Huron E. & T. Co. v. Clements,* 113 Wis. 249, 258, 89 N. W. 160; *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 69, 92 N. W. 356; *Collins v. Janesville,* 117 Wis. 415, 424, 94 N. W. 309; *Second Nat. Bank v. Smith,* 118 Wis. 18, 24, 94 N. W. 664. We cannot, however, indulge that presumption here, for an examination of the record discloses some evidence from which conclusion of contributory negligence might be drawn, albeit contradicted, and that, too, so preponderantly as to warrant the trial court in deeming justice to require a new trial. The defect was an old excavation, approximately three feet square and three feet deep, in the course of a newly opened road. It was covered with split tamarack poles. A traveled track of disputed clearness and persistency passed around it, with wheel tracks from one foot to two and a half feet away. Its perceptibility from a wagon was affirmed and denied. The road was a new and poor one, over which plaintiff was driving for the first time, and in broad daylight, and was watching the road. We cannot say that reasonable minds might not differ as to whether the plaintiff saw or ought to have seen this peril, or exercised ordinary care in driving so close that his wheels cut into it. We must therefore conclude that, if the court did not act exclusively upon the mistake in writing answer to the special verdict, he granted the new trial because he believed

the evidence to so preponderate against the finding as to make such an order proper to guard against injustice. If he did so, we are not prepared to think there was any abuse of discretion, but that his order should be sustained, except in respect of the failure to impose terms on plaintiff.

It is, however, probably true that the new trial was granted because the court was convinced by the jurors' affidavits that the written verdict did not express the conclusion of the jury, and that the peril of injustice from entry of judgment for defendant was so great that, in exercise of the discretion vested in him, a new trial ought to be had. This view presents the question whether the affidavits of jurors could be received as evidence of the facts they state. The general rule is very ancient, and often reiterated, that the statements of the jurors will not be received to establish their own misconduct or to impeach their verdict. *Edmister v. Garrison,* 18 Wis. 594, 603. An excellent collection and analysis of decided cases will be found in *Woodward v. Leavitt,* 107 Mass. 453. From this it appears that the early idea was that of secrecy in their deliberations, and, further, the impropriety of receiving jurors' statements as to their mental processes, whether to impeach or support their verdict. This rule, in its application, has been subjected to much of refinement and qualification by different courts, involving conflict of *dicta* and of actual decision which it would not be profitable to review in detail nor possible to harmonize. The necessity of some limitation to the general rule against receiving statements of the jurors is declared in *McBean v. State,* 83 Wis. 206, 209, 53 N. W. 497. In some cases the rule is limited to things which transpire in the jury room or in court, but it will be found in most of those cases also limited to matters involved in reaching the verdict. This limitation was recognized and applied in *Hempton v. State,* 111 Wis. 127, 145, 86 N. W. 596; *Roman v. State,* 41 Wis. 312; *Schissler v. State,* 122 Wis. 365, 99 N. W. 593; *Peppercorn v. Black*

River Falls, 89 Wis. 38, 41, 61 N. W. 79; *Mattox v. U. S.* 146 U. S. 140, 13 Sup. Ct. 50. In line with the same idea are a number of decisions drawing a distinction between the proceedings involved in reaching and agreeing upon the verdict and the mere act of expressing it, either orally or in writing. The following cases recognize such distinction, and hold that the reasons excluding jurors' testimony as to their conduct in the former stage do not exclude their evidence as to what really was the verdict agreed on in order to prove that it has not been correctly expressed, through mistake or otherwise: *Cogan v. Ebden,* 1 Burrows, 383; *Roberts v. Hughes,* 7 Mees. & W. 399; *Little v. Larrabee,* 2 Greenl. 37; *Weston v. Gilmore,* 63 Me. 493; *Peters v. Fogarty,* 55 N. J. Law, 386, 26 Atl. 855; *Jackson v. Dickenson,* 15 Johns. 309; *Dalrymple v. Williams,* 63 N. Y. 361; *Hodgkins v. Mead,* 119 N. Y. 166, 23 N. E. 559; *Capen v. Stoughton,* 16 Gray, 364; *Pelzer Mfg. Co. v. Hamburg-B. F. Ins. Co.* 71 Fed. 330. Several of these cases were cited with approval of this very distinction in *McBean v. State, supra.* Against their doctrine we find *Polhemus v. Heiman,* 50 Cal. 438, *Murphy v. Murphy,* 1 S. Dak. 316, 47 N. W. 142, and *McKinley v. First Nat. Bank,* 118 Ind. 375, 21 N. E. 36. Of these, the first two seem to be controlled by local statutes, and are therefore not persuasive. The Indiana case, however, squarely denies the admissibility of jurors' testimony to prove that the written answer to a special question was the reverse of the agreement in fact reached. This view is based on the rule that jurors cannot "impeach their own verdict." But is it an attempt to impeach their own verdict? That depends on the sense in which that word is used. Is the written paper filed, or the agreement which the jury reach, the verdict? We think the latter is what is intended when we say the jurors cannot impeach it. The former, like most records or writings, is but the expression or evidence of some mental conception. Hence it may well be said that a showing that such

writing is not correct is not impeachment of the verdict itself. The repudiation of written expressions, when, by mistake, they fail to express the intention or mental concept, is familiar in the law. A writing is not a contract when it fails to express that on which the minds of the parties met, and courts freely exercise power to correct mistakes when the proof leaves no doubt that the real contract was something else. That which decides the rights of parties litigant is the unanimous agreement of the jurors. Each party is entitled to such judgment as results from that agreement. Any other is presumptively unjust, and any rule that necessitates it is unreasonable, unless supported by considerations of public policy, or of such danger from opening the door to investigation that wrong is likely to be done oftener than the right promoted. We are persuaded that the reasons which should exclude a juror from showing that he made a mistake in reaching his conclusion (see *Murdock v. Sumner,* 22 Pick. 156) do not extend to a showing that the words used in conveying it to the court, or enrolling it on the records, by mistake of the person uttering or writing them, fail to express the conclusion reached by all the jurymen. Of course, the showing of the latter fact must be clear beyond peradventure; at least to warrant a change in the written verdict and final judgment thereon. If the slightest doubt lurks in the mind of the court, he should confine relief to the granting of a new trial, which, of course, he may always order when there is reasonable cause to believe that the judgment will do injustice. Some courts incline to the view that a new trial is the only relief after the jury have separated. *Little v. Larrabee, supra; Weston v. Gilmore,* 63 Me. 493. But the clear weight of authority is that, upon sufficiently clear showing of the mistake, and of what was the verdict agreed on and intended to be expressed, the court may substitute a true expression for the incorrect one, and enter judgment accordingly. See *Cogan v. Ebden, supra; Peters v. Fogarty, supra; Dalrymple v. Williams,*

supra; Hodgkins v. Mead, supra; Pelzer Mfg. Co. v. Hamburg-B. F. Ins. Co., supra.

We conclude, therefore, that the trial court properly received and considered the affidavits of the jurors in this case; that they at least sufficed to satisfy the court of great danger of injustice being done by entry of judgment in accordance with the written verdict, and therefore justified him in exercising his discretion to relieve plaintiff from the predicament in which he stood by awarding him another trial. Whether such affidavits made so plain a case as to entitle plaintiff to correction of the verdict and judgment in his favor is a question not open to plaintiff on this appeal. Plaintiff might probably have raised it had he refrained from motion for new trial and appealed from a judgment in defendant's favor. When, however, he made the latter motion, he appealed to the court's discretion to relieve him from the adverse situation which, while not due to his fault or mistake, was due neither to any misconduct of the jury nor error of the court. He had no absolute right to such relief, but merely to have the court exercise a judicial discretion whether it ought to be accorded him. The situation does not fall within any of those where it is held proper to grant the relief without terms, under the authorities on the subject above cited. We are brought to the conclusion, therefore, that the court committed no error in awarding new trial; but, whether it was granted because the verdict, as filed, was against the weight of evidence or was impugned by the affidavits of the jurors, error was committed in failing to impose reasonable terms as a condition. What those terms should be is a subject for consideration primarily by the trial court.

By the Court.—Plaintiff's appeal is dismissed. Upon defendant's appeal the order is reversed, and cause remanded with directions to embody in the order granting new trial the payment of reasonable terms by plaintiff as a condition.

TOWN OF NEWBOLD, Respondent, vs. DOUGLAS, County Treasurer, Appellant.

September 27—October 18, 1904.

Taxation: Collection of delinquent taxes: Cause of action: Parties: County treasurer: Judgments: Exceptions, when not necessary: Appeal and error.

1. When a county treasurer, in his official capacity, has moneys in his hands belonging to a town, representing the proceeds of delinquent taxes returned by the town and afterwards collected, the remedy for its collection is not against the treasurer but by action against the county as for money had and received.
2. The pleadings and findings in an action must show a state of facts from which the legal liability which is embodied in the judgment necessarily follows, or the judgment will be reversed notwithstanding the absence of exceptions.
[3. Whether in a proper action by a town against a county for delinquent taxes returned by the town, and afterwards collected, the five per cent. collection fees under sec. 1112, Stats. 1898, the five per cent. interest under sec. 1129, the twenty-five cents advertising fee on each parcel under sec. 1133, the twenty-five cents for a certificate fee on each certificate of sale under sec. 1196, and the fifteen per cent. interest on each certificate of sale of lands bid in by the county from the date of sale to the date of assignment or redemption under secs. 1165 and 1192, are properly allowable to the town, not determined.]

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Sam S. Miller, for the appellant.

A. W. Shelton, for the respondent.

WINSLOW, J. This is an action for money had and received. It was alleged in the complaint and shown by the evidence that the delinquent real-estate taxes returned by the town treasurer of the plaintiff town to the defendant as county treasurer in both the years 1901 and 1902 exceeded the county tax imposed on the town for both of said years,

and that the defendant afterwards collected, by sales of said real estate, all of said delinquent taxes, with interest and charges, but failed to pay over to the town all of the excess. The court found that the amount of the excess due the town, exclusive of interest, fees, and expenses, was $714.19, and found that the town was entitled to recover this sum, together with five per cent. collection fees, under sec. 1112, Stats. 1898, five per cent. interest under sec. 1129, twenty-five cents for an advertising fee on each parcel under sec. 1133, twenty-five cents for a certificate fee on each certificate of sale under sec. 1196, and fifteen per cent. interest on each certificate of sale of lands bid in by the county from the date of sale to the date of assignment or redemption under secs. 1165 and 1192. Judgment was entered for the plaintiff for the aggregate of these sums, and the defendant appeals.

It is very clear to our minds that the complaint does not allege, nor do the findings find any facts which justify, this judgment against the defendant. He is simply holding the money in his official capacity. In the eye of the law the money is in the possession of the county through its treasurer, and if it belongs to the plaintiff the county should be sued, not the officer. The language used in *State ex rel. School Directors v. Nelson,* 105 Wis. 111, 80 N. W. 1105, is quite applicable here, viz.:

"The right of the relators is one *against the county,* is based on implied contract to repay the money had and received to the relator's use, and would support a direct legal action but for the statute requiring claims against counties to be presented to the county board, and brought into court only by appeal."

It is true that in that case the action was an action of *mandamus* against the county treasurer, and the duty to turn over the moneys in question arose from common-law principles, and not from statute, but these facts make no difference with the principle laid down by the court, namely, that,

where a county treasurer in his official capacity has moneys in his hands belonging to another, the remedy is by action against the county as for money had and received. This principle seems to our minds self-evident and fundamental. If a municipal treasurer is liable to be sued individually in every such case, the office will surely become a very onerous and undesirable one. In legal contemplation the county holds the money, and hence the county should be sued. Of course, if the governing body has directed its treasurer to pay over the money, so that nothing remains to be done save the ministerial act of handing over the money, that act may be enforced by *mandamus;* but that is not the case here. Upon the argument of the case this point was suggested to respondent's counsel, and he was understood to refer to the case of *Crandon v. Forest Co.* 91 Wis. 239, 64 N. W. 847, as justifying the present action against the treasurer instead of against the county. The points decided in that case were that for the tortious act of the county board in remitting valid town taxes the county was not liable to the town, but that the treasurer's duty was to proceed and collect the tax if valid; and he could be compelled so to do, or to respond in damages for his failure. It requires nothing more than the mere statement of these propositions to show that they have no bearing on the present question. It is a familiar principle that the pleadings and findings must sustain the judgment; that is, they must show a state of facts from which the legal liability which is embodied in the judgment necessarily follows, or the judgment will be reversed, notwithstanding the absence of exceptions. *Blossom v. Ferguson,* 13 Wis. 75; *Optenberg v. Skelton,* 109 Wis. 241, 85 N. W. 356.

It is true that no error is assigned in the appellant's brief to that part of the judgment which directs the recovery of the principal sum of the excess, but only to that part which awards interest and charges; but as one recovery is equally unwarranted as the other, and the appeal is from the entire

judgment, we have concluded to reverse *in toto*. The question whether the various sums of interest and charges are properly allowable to the town in a proper action against the county is an interesting one, but it cannot be determined here.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

IN RE MCCAULEY.

September 27—October 18, 1904.

Criminal law and practice: Imprisonment: Escape: Recapture: Unexpired sentence: Statutes: Construction.

1. **By the common law a prisoner escaping from custody, while serving a sentence for a criminal offense, is liable to recapture and reconfinement to serve out his sentence, the term of his voluntary absence not being counted in his favor.**
2. **In such case, judicial direction, other than that contained in the original judgment, is unnecessary.**
3. **In such case, for the offense of escape, or prison breach and escape, a trial and sentence is necessary in order to punish the offender, the same as in case of other offenses.**
4. **Secs. 4490 and 4494, Stats. 1898, and ch. 75, Laws of 1901 (providing punishment for escape, and prison breach and escape), are declaratory of the common law.**

HABEAS CORPUS. *Petitioner remanded.*

Habeas corpus to Henry Town, warden of the state prison, to test his right to retain in custody at such prison *Charles McCauley,* it being alleged in the petition that said *McCauley* June 5, 1899, was by the circuit court for Portage county, Wisconsin, sentenced to imprisonment in said prison for five years, the term to commence on said day at 12 o'clock noon; that a certificate of conviction was made accordingly and said *McCauley* placed in actual confinement; that the sentence ex-

pired June 5, 1904, but nevertheless, that the warden of said prison refuses to release the petitioner.

The return to the writ is to this effect, among other things: The petitioner January 25, 1900, escaped from the state prison, where he was serving pursuant to the sentence mentioned in the petition. Thereafter he was a fugitive from justice till the 26th day of March, 1902. He had still to serve of the sentence imposed upon him at the time of his escape three years one month and ten days, after giving him allowance for all good time earned during his confinement. The full term of imprisonment, imposed upon him by the sentence aforesaid, will not expire until May 2, 1905, even if there be allowed to him all good time permissible by law under any circumstances. He is now in custody and retained in pursuance to the sentence mentioned in the petition, in order that the full term of imprisonment may be satisfied.

A motion was made to discharge the petitioner, notwithstanding the return, because of the insufficiency thereof.

James Murray and *Emerson Ela,* for the petitioner.

For the respondent there was a brief by the *Attorney General* and *L. H. Bancroft,* first assistant attorney general, and oral argument by *Mr. Bancroft.*

Marshall, J. The proposition of counsel for the relator is, that if a person confined in the state prison in execution of a sentence obtains his liberty by escape from prison or a prison breach, he can only be reconfined pursuant to a sentence under sec. 4490, Stats. 1898, providing that in case of an escape from prison the guilty person shall be punished by imprisonment "not to exceed ten years, in addition to the former sentence," or sec. 4494, Stats. 1898, providing that in case of a prisoner breaking and escaping from prison he shall be punished by imprisonment for "one year in addition to the unexpired term of the former sentence." Counsel contends that sec. 4494 was enacted to meet such a case as this

one, where at the time of the recapture the original sentence has expired, while sec. 4490 was not intended to apply to an escape from prison and recapture of the prisoner during the period for which he was sentenced, and that both sections contemplate a trial and sentence. We do not deem it necessary to the disposition of this case to argue all the questions suggested by counsel. Probably when it is called to mind that an escape from prison and a breach and escape from prison were distinct offenses at common law, the former being a misdemeanor and the latter a felony, 2 Clark & Marshall on Crimes, 1062, 1063, 11 Am. & Eng. Ency. of Law (2d ed.), 295, 302, and that a punishment in either case had nothing to do with the execution of the original sentence, it will not be very difficult to understand the purpose of the clauses of our statute, framed so carefully along the common-law lines.

It is frankly conceded by counsel for the relator that at common law a prisoner who escaped from prison and was recaptured by his custodian, or any other, and returned to such custodian, was subject to reimprisonment without a new judicial direction for a sufficient length of time to make, with his service prior to the escape, the full term of confinement at hard labor contemplated by his sentence. The authorities on that point are quite numerous and harmonious. *Cleek v. Comm.* 21 Grat. 777; *Ex parte Clifford,* 29 Ind. 106; *State v. Wamire,* 16 Ind. 357; *Dolan's Case,* 101 Mass. 219; *In re Edwards,* 43 N. J. Law, 555; *State v. Cockerham,* 24 N. C. 204; *Haggerty v. People,* 6 Lans. 332; Id., 53 N. Y. 477; *Luckey v. State,* 14 Tex. 401; *Riley v. State,* 16 Conn. 50; *Ex parte Vance,* 90 Cal. 208, 27 Pac. 209; *Henderson v. James,* 52 Ohio St. 242, 39 N. E. 805; 1 Bishop's New Crim. Proc. § 1310, subd. 5; Id., § 1384; 11 Am. & Eng. Ency. of Law (2d ed.) 313.

The text in the Am. & Eng. Ency. of Law is very accurately framed, under the authorities above cited in these words:

"Where a prisoner escapes without serving the full term of his sentence, he may, on being recaptured, in the absence of any statutory provision, be required to serve the remainder of the sentence; for the essential part of the sentence is the punishment, and he will not have borne such punishment until he has remained in custody for a period equal to that which he has been at liberty, and this though the term for which he was imprisoned may have expired by limitation."

As to the right of a custodian of a prisoner sentenced to confinement as a punishment for a criminal offense to retake him in case of his escape and reconfine him for the balance of his term, and an additional period to cover the time he was at liberty, Mr. Bishop speaks very briefly, thus: "If a prisoner has escaped and is retaken the keeper will execute the sentence with the period of absence added." As to the proceedings upon recapture, in case of doubt as to the identity of the prisoner with the one who escaped, it is suggested that the proper course is to take the prisoner before the court that rendered the judgment, or one of superior jurisdiction, and upon his identity being there established to take an order of the court for the continued execution of the judgment. In *Haggerty v. People,* 6 Lans. 332, some proceedings to obtain such an order were thought advisable, but upon review of the case, 53 N. Y. 476, that was held to be wrong and it was said that if such proceedings are taken the result will be of no significance, as it will not be *res adjudicata* of the question of identity when raised in the proper manner by *habeas corpus* proceedings commenced by the prisoner to secure his liberty.

The question of whether such a law as sec. 4490 and sec. 4494 varies the common-law rule is not new. It was raised in *Haggerty v. People, supra,* and also in *Ex parte Clifford, supra. In re Edwards, supra,* a law, similar to ch. 75, Laws of 1901, providing that a person escaping from prison while serving a sentence may, on recapture, be required to serve out the whole term for which he was sentenced, without deducting the time of his being out without leave, was held to

be but a declaration of the common law and as in no wise changing it.

Our conclusion is that by the common law a prisoner escaping from custody, while serving his sentence for a criminal offense, is liable to recapture and reconfinement to serve out his sentence, the time of his voluntary absence not being counted in his favor, and that judicial direction other than that contained in the original judgment is unnecessary, while for the offense of escape or prison breach and escape a trial and sentence is necessary in order to punish the offender, the same as in case of other offenses; that our statutes, secs. 4490 and 4494 and ch. 75, Laws of 1901, were framed to cover these common-law features; and that the words in sec. 4490 "in addition to his former sentence" and in sec. 4494 "in addition to the unexpired term" were used *ex industria,* to indicate that the punishment for the second offense is not deemed to abridge the execution of the judgment theretofore pronounced. The theory of the law is that where a judgment has once been rendered bearing solely on the person, as in the case of a sentence to confinement at hard labor as punishment for crime, it can only be satisfied by death of the party, his confinement at hard labor for the length of time mentioned in the sentence, less any good time earned according to law, by a reversal of the judgment, or by pardon. That is so firmly established that nothing short of some unmistakable legislative change thereof could be held to have that effect. The law which provides punishment for the offense of escape from prison or of breaking and escaping from prison, in addition to the punishment provided for in the original judgment, not only fails to expressly vary the law on the subject, but expressly negatives any such legislative intention.

The return to the writ of *habeas corpus* must be held sufficient and the relator, *Charles McCauley,* be remanded to the warden of the state prison.

By the Court.—So ordered.

STEPHENSON, Respondent, vs. DOOLITTLE and wife, Appellants.

September 28—October 18, 1904.

Ejectment: Tax-title claimants: Disclaimer: Cause of action: Statutes: Construction: Pleading: Frivolous answers: Immaterial error: Evidence: Materiality: Practice: Costs.

1. Secs. 3075, 3088, as amended by ch. 152, Laws of 1901, provide that the owner of unoccupied lands may maintain ejectment therefor against the person in whom the title appears of record in the office of the register of deeds in and for the county in which said premises are located. Every judgment rendered in any such action shall be conclusive as to the title established therein, upon the party against whom it is rendered and upon all persons claiming from, through or under him by title accruing after the filing of a notice of the pendency of the action in the office of the proper register of deeds, and every purchaser whose conveyance is not recorded or filed shall be deemed to have acquired his title after the filing of such notice, and shall be bound by the proceedings in the action to the same extent, and in the same manner, as if he were a party thereto. Plaintiff, subsequent to the passage of ch. 152, brought an action of ejectment against D. and wife. The lands were vacant and unoccupied, D.'s title being a tax deed, void because of certain irregularities. D. answered by a full disclaimer of any interest, except such as existed by virtue of certain tax certificates which he owned; denied the allegations as to retention of possession from plaintiff; alleged that prior to the commencement of the action he had obtained a tax deed of the premises; that thereafter and before the commencement of the action he had conveyed to another, and admitted plaintiff's ownership and possession. D.'s wife, answering separately, admitted the allegations of the complaint, disclaimed any right to the property and denied being a party to a retention thereof from the plaintiff. Both answers were stricken out as frivolous. *Held*, that while before the enactment of ch. 152 an action in ejectment could not be maintained against a person circumstanced as D., it could be under that statute, and hence that D. could not, by a mere disclaimer, put plaintiff in the wrong and obtain a judgment for costs against him.
2. In such case, D.'s wife being also charged with personal liability for withholding the land from plaintiff, plaintiff was not war-

ranted in charging her under ch. 152, Laws of 1901, she having no apparent record title, and therefore her answer disclaiming title was a complete defense to the cause of action against her charging personal liability.

3. In such case, it was error to strike out D.'s answer as frivolous. An answer is not frivolous merely because it admits the claim of the plaintiff, or, in addition to admissions, pleads the existence of facts showing that defendant is entitled to statutory protection accorded one in his situation.
4. In such case, plaintiff having established his cause of action by evidence against D. and his wife, so far as she was merely charged as such, D. was not prejudiced by striking out his answer as frivolous.
5. In such case, evidence as to the conveyance of the tax title before the action was commenced, and that no notice of *lis pendens* had been filed, is immaterial.
6. In such case, the striking out of D.'s answer did not preclude him from making proof of the amount of expenditures (tax certificates, tax-deed fees, recording, etc.), based upon his tax deed.
7. Where, in ejectment, the plaintiff is entitled to recover by reason of an invalid tax deed, the proceedings to establish defendant's expenditures, based on his tax deed, under sec. 3087, Stats. 1898, are not a part of the trial of the issues tendered by the complaint, but should take place after the preliminary question of whether plaintiff is entitled to recover, subject thereto, shall have been determined.
8. In an action of ejectment, one of the defendants was properly joined with her husband by reason of her inchoate right of dower, and was also charged with personal liability for withholding the land from plaintiff. She answered by full disclaimer. *Held*, that since plaintiff was entitled in any event to recover against the wife as to her apparent dower, she was not, under sec. 2920, Stats. 1898, entitled to costs against plaintiff. MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

The complaint is in the ordinary form, the defendants being charged as jointly withholding the land from plaintiff. In the title to the complaint *Bessie W. Doolittle* was named as the wife of *Lelon A. Doolittle.* The latter answered by a full disclaimer of any interest in the premises, except such as

existed by virtue of some tax-sale certificates which he owned; and denied the allegation as to his having retained possession of the property from the plaintiff. Further, he alleged that, prior to the commencement of the action and on the 17th of May, 1902, he obtained a tax deed of the property in due form, duly recorded same, and thereafter, before the commencement of this action, by an instrument duly executed, so as to be entitled to record, conveyed all rights under such deed to another. Further answering, he admitted the claim of the plaintiff to ownership of the property and possession thereof. Defendant *Bessie W. Doolittle,* by an answer describing herself as the wife of *Lelon A. Doolittle,* admitted the allegations of the complaint, disclaimed any right to the property in dispute, and denied being a party to a retention thereof from the plaintiff. On motion of plaintiff's attorney both answers were stricken out as frivolous, permission being granted to each of the defendants to answer anew on payment of $10 costs. No answer was served within the time specified. Whereupon plaintiff applied to the court for judgment. After hearing the evidence, the court found to the effect that the allegations of the complaint as to the title of the plaintiff were true; that the defendant *Bessie W. Doolittle* was the wife of *Lelon A. Doolittle;* that the latter obtained and recorded a tax deed, as alleged in his answer; that at the time of the commencement of this action the title to the premises in dispute appeared of record to be in said *Lelon A. Doolittle* by virtue of such tax deed; that the land was vacant and unoccupied, and that the tax deed was void because of certain irregularities in the tax proceedings, specified. Upon such facts it was decided that plaintiff was entitled to judgment against both of the defendants for the recovery of the property, and for costs, upon condition of his complying with the statutory conditions precedent to relief in case of the right to a judicial recovery of land by reason of the invalidity of a tax deed. Subsequently, plaintiff having complied with

such conditions, judgment was rendered in his favor as ordered, except that no judgment for costs was rendered against *Bessie W. Doolittle.* Defendants joined in appealing therefrom.

For the appellants the cause was submitted on the brief of *L. A. Doolittle.*

For the respondent there was a brief by *Reid, Smart & Curtis,* and oral argument by *A. H. Reid.*

MARSHALL, J. Counsel for appellants invoke *Webster v. Pierce,* 108 Wis. 407, 83 N. W. 938, in support of the proposition that the answer of *Lelon A. Doolittle* disclaiming any interest in the premises described in the complaint, and admitting the plaintiff's right thereto, as alleged, not being in any way falsified, entitled him to judgment dismissing the complaint with costs, notwithstanding ch. 152, Laws of 1901. It was held in that case that the constructive possession of unoccupied land by the grantee in a tax deed by reason of the recording thereof, terminates upon his transferring his tax title to another, though the instrument affecting such transfer is not recorded, and that in case an action of ejectment is commenced against him by the former owner, so called, such owner not knowing of such transfer, the answer of such grantee containing a full disclaimer, until falsified by the plaintiff, is a complete defense to the plaintiff's cause of action and renders him liable for costs, though the dismissal of the complaint will have the effect to settle the title in the latter's favor, as between him and the defendant. That would rule this case in appellants' favor, if it were not for ch. 152, aforesaid, which provides that the owner of unoccupied land may maintain ejectment therefor "against the person in whom the title appears of record in the office of the register of deeds in and for the county in which said premises are located, at the commencement of the action. Every judgment rendered in any such action shall be conclusive as to

the title established therein, upon the party against whom it is rendered and upon all persons claiming from, through or under him by title accruing after the filing of a notice of the pendency of the action in the office of the proper register of deeds, . . . and every purchaser whose conveyance is not recorded or filed shall be deemed to have acquired his title after the filing of such notice, and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto."

Counsel contend that it was not intended by such a law to affect a defendant in the circumstances of this case, but that its purpose was to bind the holder of an unrecorded deed as to his claim of title the same as if he were a defendant and answered by a disclaimer.

The language of the law above quoted is not ambiguous. By its terms it clearly avoids the effect of the decision in *Webster v. Pierce,* and doubtless was passed for that very purpose. Taking it as it reads, and we are unable to perceive any reason why it should not be so taken, it provides in effect that, whereas prior to the enactment thereof an action in ejectment was not maintainable against a person in the circumstances of appellant *Lelon A. Doolittle* in this case, that may now be done. That being so, manifestly upon an action being so properly brought the defendant cannot, by a mere disclaimer, put the plaintiff in the wrong and obtain a judgment for costs against him.

The appellant *Bessie W. Doolittle* was properly made a defendant as the wife of *Lelon A. Doolittle,* but she was charged with personal liability for withholding the land from the plaintiff and was therefore required for her protection to answer the complaint. As to such personal claim, plaintiff was not warranted in charging her under the statute aforesaid, because she had no apparent record title. Consequently her answer disclaiming title contained a complete defense to the cause of action against her charging personal liability. *Web-*

ster v. Pierce, supra. It follows that the order striking out her answer as frivolous was wrong.

The answer of appellant *Lelon A. Doolittle,* since, in addition to a disclaimer, it set forth facts to the effect that when the action was commenced he appeared to be the owner of the land by virtue of a tax deed, though he had in fact theretofore conveyed his tax title claim to another, and that the tax deed was void, and plaintiff was entitled to recover subject to his statutory right to protection for tax claims,—confessed the plaintiff's case and afforded him an opportunity to move for an order for judgment on the pleading, subject to such statutory right. We fail to see how the answer could be deemed frivolous in any sense. An answer is not frivolous merely because it admits the claim of the plaintiff, or in case of this kind, in addition to such admission, pleads the existence of facts showing that the defendant is entitled to the statutory protection accorded to one when another is entitled to recover land from him by reason of the invalidity of a tax deed. Such an answer does not purport to defend against the claim of the plaintiff, nor does it present to the court for consideration anything except what is proper to be and necessarily must be considered. Therefore, the order of the court striking out the answer of defendant *Lelon A. Doolittle* as frivolous was erroneous.

Notwithstanding the foregoing, since after the answers were stricken out, plaintiff established his cause of action by evidence as to *Lelon A. Doolittle,* and obtained, as to him, and also as to his wife, so far as she was merely charged as such, the judgment which he might have secured by motion on the pleading, he was not prejudiced by striking out his answer. The fact that the order contained a provisional requirement for the payment of $10 costs does not affect the matter, since no costs were in fact paid, nor required to be paid in order to protect any valuable rights of his.

Counsel insist that *Lelon A. Doolittle* should have been permitted to make proof, as follows:

(a) That he had conveyed the tax title before this action was begun;

(b) That no notice of *lis pendens* had been filed;

(c) Of the amount of expenditures, tax certificates, tax-deed fees, recording, etc., upon which the tax deed was based.

On the first point, as we have seen, evidence was immaterial. On the second point evidence was also immaterial, since if respondent failed to take any steps necessary to bar one not before the court that person could not be prejudiced by want of proof in the action of such failure. On the third point it is sufficient to say that the striking out of the answer did not preclude *Lelon A. Doolittle* from making the proof. His right to be present and participate in the ascertainment of the amount respondent should pay as a condition of relief, under the statute for the protection of the equitable claims of the defendant in such cases, was unimpaired. The determination of that question was not a part, strictly speaking, of the trial of the issues tendered by the complainant. The statute in that regard is mandatory. It provides that when a plaintiff shall establish his right to recover "unless it shall be made to appear affirmatively by the plaintiff that the premises claimed were not liable to taxation for the taxes for which they were sold, or that such tax was paid prior to the sale, or the land was redeemed from such sale, the court shall order that the amount for which such land was sold, and the cost of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on all such sums at the rate of fifteen per cent. per annum for the time so paid until the date of the verdict, shall be set off against the damages awarded to the plaintiff by the verdict; and if there be any excess, that the plaintiff as a condition of judgment, shall pay the same, with interest from the date of the verdict, with-

in ninety days." Sec. 3087, Stats. 1898. So, strictly speaking, it will be seen the proceedings in execution of the statute properly take place after the preliminary question of whether plaintiff is entitled to recover subject thereto, shall have been determined.

As to the defendant, *Bessie W. Doolittle,* counsel contend that her position is different from that of her husband because there was no allegation in the pleadings as to her wifehood, and she was charged as a wrongdoer the same as her husband. True, she was so charged, but she was properly joined with her husband by reason of the inchoate right of dower which she possessed in the land, contingent upon her husband having title thereto. It clearly appeared by the pleadings, regardless of the body thereof, that she is the wife of *Lelon A. Doolittle.* She is so described in the title to the action in the complaint, she so describes herself in her answer and her husband likewise describes her in his answer. If she had been simply made a defendant in her capacity as wife, she would not have been required to answer in order to protect herself from danger of a judgment for costs. Not so, however, in view of the fact that she was charged with a personal liability and was required to answer. As the situation created by her disclaimer, and the want of any falsification thereof, was not affected by the law of 1901, there being no claim that she had any apparent title to the land in question when the action was commenced, why the rule in *Webster v. Pierce, supra,* does not condemn the order striking out her answer as frivolous, and the judgment denying costs to her against the respondent, is at least a debatable question.

If the appellant *Bessie W. Doolittle* was entitled to recover costs from the respondent by prevailing on her disclaimer, notwithstanding the recovery against her in her capacity as wife of her codefendant, the authority therefor exists in sec. 2920, Stats. 1898. That provides that unless plaintiff is entitled to recover costs under the two preceding

sections, where there are several defendants "not united in interest and making separate defenses by separate answers and the plaintiff recovers against one or more, but not all of such defendants, the court may award costs to such of the defendants as have judgment in their favor, or any one of them." It is considered that since the plaintiff here would have been entitled in any event to recover against *Mrs. Doolittle* as to any apparent right of dower, the fact that she was entitled to prevail as to the personal liability charged against her does not sufficiently satisfy the calls of such section as to permit of her recovering costs. The writer of this opinion does not join in that view. They are the views of the court. His views on this subject will be stated briefly in an independent opinion.

By the Court.—The judgment is affirmed.

MARSHALL, J. (*dissenting*). With the court's conclusion that *Mrs. Doolittle* was not entitled to costs under her unfalsified disclaimer, I cannot concur. It commits the court, as I understand it, to this: If a person is brought in as a mere proper defendant, the circumstances being such that, if he does not defend, no judgment for costs can be rendered against him, and the complaint in addition to allegations showing his contingent interest, rendering him a proper defendant, contains others, constituting a personal liability requiring him to make a separate defense by a separate answer, and he makes such answer and defense and prevails, he cannot recover costs, if plaintiff recovers against his codefendant. No such ruling has heretofore been made under sec. 2920, Stats. 1898, that covers the subject. No such ruling has been made elsewhere under any similar law, so far as I can discover. The history of such law dates back over fifty years. I think it has always been assumed, and the practice is accordingly, that in the circumstances stated, the one so required to defend, upon prevailing takes costs. The statute reads as follows:

"Costs shall be allowed of course to the defendant in the actions mentioned in the two preceding sections unless the *plaintiff be entitled to costs therein,* but where there are several defendants not united in interest and making separate defenses by separate answers, and the *plaintiff recovers against one or more but not all* of such defendants, the court may award costs to such of the defendants as have judgment in their favor or to any of them."

My brethren give a very strict, and to my mind, an unreasonable construction to the words "unless plaintiff be entitled to costs therein," and "the plaintiff recovers against one or more of them but not all." They hold that if plaintiff recovers costs against one defendant he "recovers costs therein," within the meaning of the statute, and so no defendant can have costs. Further, that if plaintiff recovers against a mere nominal defendant incidental to the recovery against the other defendant he "recovers against all," within the meaning of the statute, though as to the claim of personal liability against such nominal defendant he is defeated. It seems to me that this is wholly inconsistent with the spirit of the statute. The legislative purpose seems to be plain that if one is compelled to defend in an action and his defense is separate and distinct from that of the other defendant and he successfully make such separate defense under a separate answer, he is entitled to costs the same as if he were the sole defendant. The statute was framed upon the common-law principle that a person who is brought into court and is unjustly compelled to defend he should have costs against his adversary. *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909. The reasonable meaning of the words "unless the plaintiff be entitled to costs therein" is entitled to costs against the particular defendant in question; and the reasonable call of the words "plaintiff recovers against one or more but not all" is a recovery legitimately carrying, at least, costs against all.

The controlling idea of the statute is that every party to

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(c) Of the amount of expenditures, tax certificates, tax-deed fees, recording, etc., upon which the tax deed was based.

On the first point, as we have seen, evidence was immaterial. On the second point evidence was also immaterial, since if respondent failed to take any steps necessary to bar one not before the court that person could not be prejudiced by want of proof in the action of such failure. On the third point it is sufficient to say that the striking out of the answer did not preclude *Lelon A. Doolittle* from making the proof. His right to be present and participate in the ascertainment of the amount respondent should pay as a condition of relief, under the statute for the protection of the equitable claims of the defendant in such cases, was unimpaired. The determination of that question was not a part, strictly speaking, of the trial of the issues tendered by the complainant. The statute in that regard is mandatory. It provides that when a plaintiff shall establish his right to recover "unless it shall be made to appear affirmatively by the plaintiff that the premises claimed were not liable to taxation for the taxes for which they were sold, or that such tax was paid prior to the sale, or the land was redeemed from such sale, the court shall order that the amount for which such land was sold, and the cost of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on all such sums at the rate of fifteen per cent. per annum for the time so paid until the date of the verdict, shall be set off against the damages awarded to the plaintiff by the verdict; and if there be any excess, that the plaintiff as a condition of judgment, shall pay the same, with interest from the date of the verdict, with-

in ninety days." Sec. 3087, Stats. 1898. So, strictly speaking, it will be seen the proceedings in execution of the statute properly take place after the preliminary question of whether plaintiff is entitled to recover subject thereto, shall have been determined.

As to the defendant, *Bessie W. Doolittle,* counsel contend that her position is different from that of her husband because there was no allegation in the pleadings as to her wifehood, and she was charged as a wrongdoer the same as her husband. True, she was so charged, but she was properly joined with her husband by reason of the inchoate right of dower which she possessed in the land, contingent upon her husband having title thereto. It clearly appeared by the pleadings, regardless of the body thereof, that she is the wife of *Lelon A. Doolittle.* She is so described in the title to the action in the complaint, she so describes herself in her answer and her husband likewise describes her in his answer. If she had been simply made a defendant in her capacity as wife, she would not have been required to answer in order to protect herself from danger of a judgment for costs. Not so, however, in view of the fact that she was charged with a personal liability and was required to answer. As the situation created by her disclaimer, and the want of any falsification thereof, was not affected by the law of 1901, there being no claim that she had any apparent title to the land in question when the action was commenced, why the rule in *Webster v. Pierce, supra,* does not condemn the order striking out her answer as frivolous, and the judgment denying costs to her against the respondent, is at least a debatable question.

If the appellant *Bessie W. Doolittle* was entitled to recover costs from the respondent by prevailing on her disclaimer, notwithstanding the recovery against her in her capacity as wife of her codefendant, the authority therefor exists in sec. 2920, Stats. 1898. That provides that unless plaintiff is entitled to recover costs under the two preceding

(and not otherwise) said right of way shall revert to the respective grantors thereof, or to their successors or assigns." That the lumber company should, at its own expense, clear said right of way, and construct grades, culverts, and bridges (except a bridge across Plum Lake), and lay the necessary cross-ties for said spur track, to the satisfaction of the railway's engineer. That the railway company should construct the bridge across Plum Lake, and furnish and put in place all the rails and other material necessary to complete said spur track, and should provide the rolling stock, and maintain and operate said track, and have the exclusive management thereof. There were provisions for the rapidity of loading by the lumber company, rate of freight to Merrill on its logs, and shipment of the product from Merrill over the railway's other lines; also, that the railway company might construct branches and extensions as it saw fit, and use the spur track for the purpose of hauling over it freight of all descriptions, without compensation to the lumber company, except a payment of ten cents per 1,000 for all sawlogs and lumber belonging to other persons. By the seventh section it was agreed that the contract should remain in force until such time as the lumber company had removed all the timber it desired to transport by rail from the described lands and any other lands in said township it might acquire, but not exceeding the term of ten years, and that "at any time during the continuance hereof the railway company may purchase, and the lumber company will sell to it, all the right, title, and interest of the lumber company in and to said spur track, at and for the sum equal to the costs of such interest, but not exceeding the sum of $11,979.60, and that upon the tender to it by the railway company of such actual cost, or of the aforesaid sum, the lumber company shall convey and warrant to the railway company, free and clear of any and all liens and incumbrances, all its right, title, and interest in and to the right of way (of the width hereinbefore specified) and

to said spur track, and to all structures and improvements thereon and appurtenances thereto." It further provided that, in case of refusal to make such conveyance, then thirty days after demand the railway company might declare the contract at an end and remove its rails, fastenings, and other materials from said spur track, and should not be subject to any claim for damages on account of such removal, but should not be precluded from taking any other lawful remedy to enforce its right under this contract, particularly to the conveyance of the lumber company's interest in said spur track, in case of its election to purchase as aforesaid; that, upon so acquiring the lumber company's interest in the said spur track, then and thereafter, during the term of the contract, the railway company should transport the lumber company's logs upon the same terms, but should not be required to pay to the lumber company any compensation for hauling over said spur the freight, logs, or lumber of other parties. Afterwards an extension of about a mile was agreed to upon the same terms, and the amount payable to the lumber company, upon election to purchase, was increased to $16,079.60. Thereafter the lumber company obtained conveyances to itself of a 100-foot strip of land on the line surveyed, with no limit to its time of enjoyment, and a spur track was constructed over the same and over lands which the defendant owned in fee simple. At the time of the finding the defendant had not completed cutting and transportation of its timber, but required about one year more therefor, and might purchase other lands in the vicinity, necessitating still further increase of the time. About September 30, 1902, and again about January 14, 1903, the plaintiff demanded of the defendant that it execute to it a good and sufficient conveyance of the exclusive use for all railway purposes of the 100-foot strip, without any limit of time, save that it should terminate in case of abandonment of the spur track and removal of rails and other materials. The defendant refused to make

the title established therein, upon the party against whom it is rendered and upon all persons claiming from, through or under him by title accruing after the filing of a notice of the pendency of the action in the office of the proper register of deeds, . . . and every purchaser whose conveyance is not recorded or filed shall be deemed to have acquired his title after the filing of such notice, and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto."

Counsel contend that it was not intended by such a law to affect a defendant in the circumstances of this case, but that its purpose was to bind the holder of an unrecorded deed as to his claim of title the same as if he were a defendant and answered by a disclaimer.

The language of the law above quoted is not ambiguous. By its terms it clearly avoids the effect of the decision in *Webster v. Pierce,* and doubtless was passed for that very purpose. Taking it as it reads, and we are unable to perceive any reason why it should not be so taken, it provides in effect that, whereas prior to the enactment thereof an action in ejectment was not maintainable against a person in the circumstances of appellant *Lelon A. Doolittle* in this case, that may now be done. That being so, manifestly upon an action being so properly brought the defendant cannot, by a mere disclaimer, put the plaintiff in the wrong and obtain a judgment for costs against him.

The appellant *Bessie W. Doolittle* was properly made a defendant as the wife of *Lelon A. Doolittle,* but she was charged with personal liability for withholding the land from the plaintiff and was therefore required for her protection to answer the complaint. As to such personal claim, plaintiff was not warranted in charging her under the statute aforesaid, because she had no apparent record title. Consequently her answer disclaiming title contained a complete defense to the cause of action against her charging personal liability. *Web-*

ster v. Pierce, supra. It follows that the order striking out her answer as frivolous was wrong.

The answer of appellant *Lelon A. Doolittle,* since, in addition to a disclaimer, it set forth facts to the effect that when the action was commenced he appeared to be the owner of the land by virtue of a tax deed, though he had in fact theretofore conveyed his tax title claim to another, and that the tax deed was void, and plaintiff was entitled to recover subject to his statutory right to protection for tax claims,—confessed the plaintiff's case and afforded him an opportunity to move for an order for judgment on the pleading, subject to such statutory right. We fail to see how the answer could be deemed frivolous in any sense. An answer is not frivolous merely because it admits the claim of the plaintiff, or in case of this kind, in addition to such admission, pleads the existence of facts showing that the defendant is entitled to the statutory protection accorded to one when another is entitled to recover land from him by reason of the invalidity of a tax deed. Such an answer does not purport to defend against the claim of the plaintiff, nor does it present to the court for consideration anything except what is proper to be and necessarily must be considered. Therefore, the order of the court striking out the answer of defendant *Lelon A. Doolittle* as frivolous was erroneous.

Notwithstanding the foregoing, since after the answers were stricken out, plaintiff established his cause of action by evidence as to *Lelon A. Doolittle,* and obtained, as to him, and also as to his wife, so far as she was merely charged as such, the judgment which he might have secured by motion on the pleading, he was not prejudiced by striking out his answer. The fact that the order contained a provisional requirement for the payment of $10 costs does not affect the matter, since no costs were in fact paid, nor required to be paid in order to protect any valuable rights of his.

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On the first point, as we have seen, evidence was immaterial. On the second point evidence was also immaterial, since if respondent failed to take any steps necessary to bar one not before the court that person could not be prejudiced by want of proof in the action of such failure. On the third point it is sufficient to say that the striking out of the answer did not preclude *Lelon A. Doolittle* from making the proof. His right to be present and participate in the ascertainment of the amount respondent should pay as a condition of relief, under the statute for the protection of the equitable claims of the defendant in such cases, was unimpaired. The determination of that question was not a part, strictly speaking, of the trial of the issues tendered by the complainant. The statute in that regard is mandatory. It provides that when a plaintiff shall establish his right to recover "unless it shall be made to appear affirmatively by the plaintiff that the premises claimed were not liable to taxation for the taxes for which they were sold, or that such tax was paid prior to the sale, or the land was redeemed from such sale, the court shall order that the amount for which such land was sold, and the cost of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on all such sums at the rate of fifteen per cent. per annum for the time so paid until the date of the verdict, shall be set off against the damages awarded to the plaintiff by the verdict; and if there be any excess, that the plaintiff as a condition of judgment, shall pay the same, with interest from the date of the verdict, with-

in ninety days." Sec. 3087, Stats. 1898. So, strictly speaking, it will be seen the proceedings in execution of the statute properly take place after the preliminary question of whether plaintiff is entitled to recover subject thereto, shall have been determined.

As to the defendant, *Bessie W. Doolittle,* counsel contend that her position is different from that of her husband because there was no allegation in the pleadings as to her wifehood, and she was charged as a wrongdoer the same as her husband. True, she was so charged, but she was properly joined with her husband by reason of the inchoate right of dower which she possessed in the land, contingent upon her husband having title thereto. It clearly appeared by the pleadings, regardless of the body thereof, that she is the wife of *Lelon A. Doolittle.* She is so described in the title to the action in the complaint, she so describes herself in her answer and her husband likewise describes her in his answer. If she had been simply made a defendant in her capacity as wife, she would not have been required to answer in order to protect herself from danger of a judgment for costs. Not so, however, in view of the fact that she was charged with a personal liability and was required to answer. As the situation created by her disclaimer, and the want of any falsification thereof, was not affected by the law of 1901, there being no claim that she had any apparent title to the land in question when the action was commenced, why the rule in *Webster v. Pierce, supra,* does not condemn the order striking out her answer as frivolous, and the judgment denying costs to her against the respondent, is at least a debatable question.

If the appellant *Bessie W. Doolittle* was entitled to recover costs from the respondent by prevailing on her disclaimer, notwithstanding the recovery against her in her capacity as wife of her codefendant, the authority therefor exists in sec. 2920, Stats. 1898. That provides that unless plaintiff is entitled to recover costs under the two preceding

sections, where there are several defendants "not united in interest and making separate defenses by separate answers and the plaintiff recovers against one or more, but not all of such defendants, the court may award costs to such of the defendants as have judgment in their favor, or any one of them." It is considered that since the plaintiff here would have been entitled in any event to recover against *Mrs. Doolittle* as to any apparent right of dower, the fact that she was entitled to prevail as to the personal liability charged against her does not sufficiently satisfy the calls of such section as to permit of her recovering costs. The writer of this opinion does not join in that view. They are the views of the court. His views on this subject will be stated briefly in an independent opinion.

By the Court.—The judgment is affirmed.

MARSHALL, J. (*dissenting*). With the court's conclusion that *Mrs. Doolittle* was not entitled to costs under her unfalsified disclaimer, I cannot concur. It commits the court, as I understand it, to this: If a person is brought in as a mere proper defendant, the circumstances being such that, if he does not defend, no judgment for costs can be rendered against him, and the complaint in addition to allegations showing his contingent interest, rendering him a proper defendant, contains others, constituting a personal liability requiring him to make a separate defense by a separate answer, and he makes such answer and defense and prevails, he cannot recover costs, if plaintiff recovers against his codefendant. No such ruling has heretofore been made under sec. 2920, Stats. 1898, that covers the subject. No such ruling has been made elsewhere under any similar law, so far as I can discover. The history of such law dates back over fifty years. I think it has always been assumed, and the practice is accordingly, that in the circumstances stated, the one so required to defend, upon prevailing takes costs. The statute reads as follows:

"Costs shall be allowed of course to the defendant in the actions mentioned in the two preceding sections unless the *plaintiff be entitled to costs therein,* but where there are several defendants not united in interest and making separate defenses by separate answers, and the *plaintiff recovers against one or more but not all* of such defendants, the court may award costs to such of the defendants as have judgment in their favor or to any of them."

My brethren give a very strict, and to my mind, an unreasonable construction to the words "unless plaintiff be entitled to costs therein," and "the plaintiff recovers against one or more of them but not all." They hold that if plaintiff recovers costs against one defendant he "recovers costs therein," within the meaning of the statute, and so no defendant can have costs. Further, that if plaintiff recovers against a mere nominal defendant incidental to the recovery against the other defendant he "recovers against all," within the meaning of the statute, though as to the claim of personal liability against such nominal defendant he is defeated. It seems to me that this is wholly inconsistent with the spirit of the statute. The legislative purpose seems to be plain that if one is compelled to defend in an action and his defense is separate and distinct from that of the other defendant and he successfully make such separate defense under a separate answer, he is entitled to costs the same as if he were the sole defendant. The statute was framed upon the common-law principle that a person who is brought into court and is unjustly compelled to defend he should have costs against his adversary. *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909. The reasonable meaning of the words "unless the plaintiff be entitled to costs therein" is entitled to costs against the particular defendant in question; and the reasonable call of the words "plaintiff recovers against one or more but not all" is a recovery legitimately carrying, at least, costs against all.

The controlling idea of the statute is that every party to

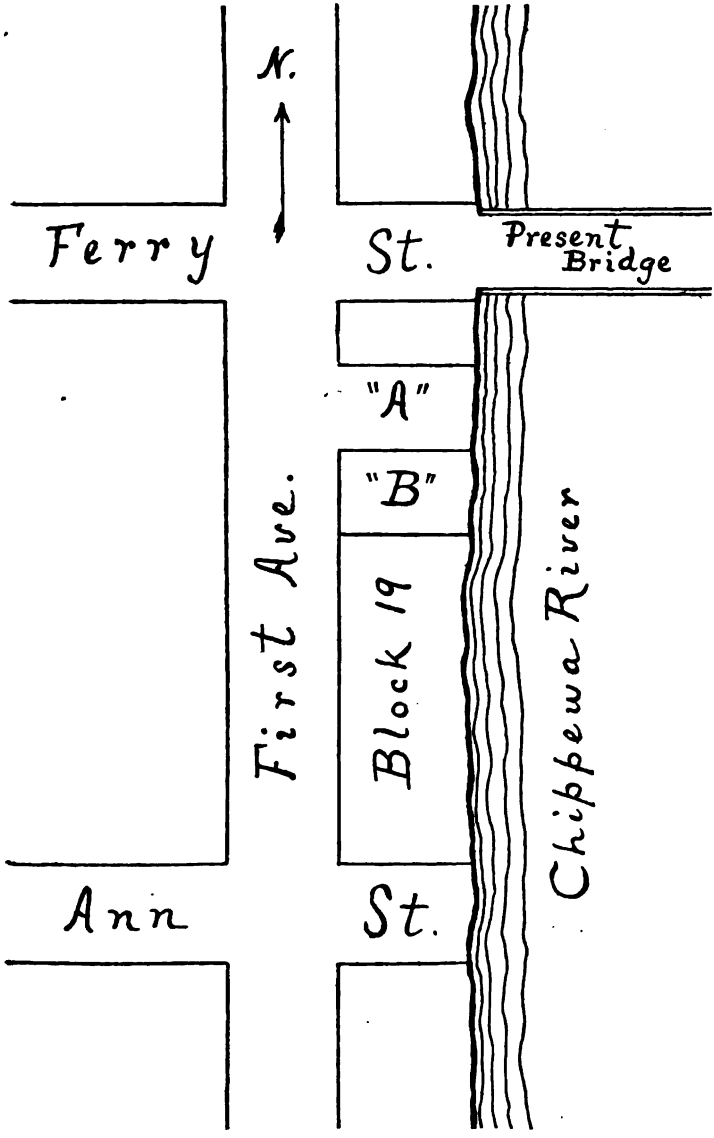
conveyed to the plaintiff a parcel of land in block 19 immediately south of Bridge street, describing it as follows:

"Commencing at the point where Bridge street and First avenue intersect, and running south on the line of block number nineteen (19) seventy-five (75) feet; thence to the river on a line parallel with Bridge street; thence on the line of the river to Bridge street; thence on the line of Bridge street to the place of beginning—being a part of block number nineteen (19), in Eau Claire Lumber Company's corrected plat of Chapman & Thorp's Second addition."

The situation will be made more clear by reference to the map on next page, on which the strip called "Bridge street" is marked "A" and the parcel purchased by the plaintiff in 1879 is marked "B." In the year 1880 the bridge was swept away by a flood, but was rebuilt in the same year; but, when rebuilt, its west approach was placed upon Ferry street, and the parcel of land formerly known as "Bridge street" ceased to be used as a street, being in fact largely swept away by the flood, and thereafter Ferry street was familiarly known by the public as "Bridge street," though the name was never legally changed. In March, 1884, the Eau Claire Lumber Company deeded to the city the piece of land formerly called "Bridge street," by metes and bounds, for consideration expressed of $500, and it was described in the deed as land formerly occupied as a street; and in 1887 or 1888 the city constructed a public sewer in said parcel of land, emptying into the Chippewa river, and did some filling thereon, and has continuously maintained said sewer thereon. In February, 1894, the plaintiffs sold to the defendant the piece of land marked "B" on the plat, and described the same in the deed as follows:

"Commencing at the southeast corner of First avenue and Ferry street, in block No. 19, in Eau Claire Lumber Co.'s corrected plat of Chapman & Thorp's Second addition to Eau Claire city; thence running southerly, on a line parallel with First avenue, 75 feet; thence easterly, on a line parallel with

said Ferry street, to the Chippewa river; thence northerly, along the line of low-water mark of said Chippewa river, to the southerly line of said Ferry street; thence westerly, along



said Ferry street, to the point of beginning—the same being that part of block No. 19 in said addition lying immediately south of where the old bridge entered Ferry street, and extends 75 feet along the easterly side of said First avenue."

In this deed the words "Ferry street" were used by mistake for the words "Bridge street," but the deed has never been reformed, and no counterclaim is interposed in the present action for reformation thereof. The defendant took possession of the land so sold immediately after the execution of the deed, and has remained in possession thereof ever since, and has also had possession of the south half of Bridge street. The plaintiffs have had no possession since the execution of the last-named deed. In the course of the negotiations for the last-named purchase, the plaintiffs' agent represented to the defendant that the premises in dispute were a part of the public street, and that the city could not sell it, and that it would belong to the defendant. February 6, 1904, the city made a deed of the strip of land in dispute to the plaintiffs for the consideration of $1.

The court concluded, upon these facts, that, while Bridge street had been abandoned as a street for many years before the year 1894, still the right of the city to use the same for street purposes had not been lost at that time, and that the deed executed by the Eau Claire Lumber Company to the city in 1884 conveyed no title, because the title thereto was in the adjacent property owners, subject to public easement; that the deed from the city to the plaintiffs conveyed no title; and that the deed executed in February, 1894, by the plaintiffs to the defendant, should be reformed by inserting the words "Bridge street" for "Ferry street;" that when so reformed said deed recognizes Bridge street as still an existing street, and estops the plaintiffs from claiming that it is not a street; that the defendant owns the strip of land in dispute, subject only to the right of the public to use the same as a street, if any such right still remains, which question was not

decided. Upon these findings judgment was entered for the defendant, dismissing the complaint, and the plaintiffs appeal.

Fred Arnold, for the appellants.

A. C. Larson, for the respondent.

WINSLOW, J. In the present case it appears that the piece of land in question was dedicated to the public use as a street by the then owner thereof in the year 1870, and that it was accepted by the public and continuously used as a street until the year 1880; the plaintiffs, in 1879, having acquired title to the parcel of land immediately adjoining the street on the south, and thereby having become owners of the south half of the street (being the parcel in dispute), subject to the public easement thereon for street purposes. It further appears that the public ceased to use the premises for travel in 1880, because the bridge across the river had been swept away, and, when rebuilt, was approached from another street, and that in 1887 or 1888 a public sewer was constructed through the parcel, which has ever since been maintained; that in 1894 the plaintiffs conveyed to the defendant the piece of land which they bought in 1879, by a description which, though erroneous in its calls, sufficiently described the parcel as that part of block 19 "lying immediately south of where the old bridge entered Ferry street, and extends 75 feet along the easterly side of said First avenue." The defendant immediately went into possession of the parcel so sold, and has remained in possession thereof, together with the south half of the alleged street, ever since. It is entirely clear that if the strip in question was still a part of the public street in 1894, when the plaintiffs so deeded to the defendant, then the defendant acquired title thereto by that deed, subject only to the public easement, and that thereafter neither the abandonment by the city nor conveyance by the city could vest title in the plaintiffs.

In the view we have taken of the case we find this the only question necessary to be considered, namely, was the land in question a part of the public street in 1894? At that time it had not been used as a street for travel for nearly fourteen years. In 1884 the city had accepted a deed from the original proprietors in which it was described as a strip of land "formerly occupied as a street," and in 1887 the city had constructed a public sewer through the strip, and filled it in, and maintained the sewer ever since that time. This court has uniformly taken advanced ground in favor of the public on the question of the loss of rights in public streets by nonuser or abandonment. The cases are numerous, and it is unnecessary to consider them in detail. Their effect is to hold that municipal corporations cannot sell the streets, nor will mere laches or nonuser on the part of the authorities or the public suffice to defeat public rights, but that cases may arise where private rights and interests have grown up, founded upon the nonaction or action, as the case may be, of the public, so that the prevention of injustice will require the application of the well-understood principles of estoppel as against the public right. *Trester v. Sheboygan,* 87 Wis. 496, 58 N. W. 747; *Reilly v. Racine,* 51 Wis. 526, 530, 8 N. W. 417; *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 61 N. W. 1108; *Reuter v. Lawe,* 94 Wis. 300, 68 N. W. 955; *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101; *Davis v. Appleton,* 109 Wis. 580, 85 N. W. 515.

Applying this principle to the present case, we find nothing amounting to an estoppel *in pais* in the year 1894 or prior thereto. The most that can be said is that there was nonuse of the strip by the public for street purposes for nearly fourteen years, and that the public in 1884 accepted a deed of the strip from the original proprietor. The plaintiffs did not act, and paid out no money in reliance upon any act or refusal to act on the part of the city. Their position had not, in 1894, been changed or influenced in the least. The conclu-

sion necessarily is that the public rights were unimpaired in 1894, and that the defendant then acquired title to the strip in dispute, subject to the public rights. Whether those public rights have been lost by abandonment and estoppel since that time is immaterial, and was not determined in the trial court, nor will any attempt be made to determine the question here. Any abandonment since that time would not inure to the plaintiffs, and the city could not deed away the public streets.

By the Court.—Judgment affirmed.

THE STATE EX REL. N. C. FOSTER LUMBER COMPANY, Appellant, vs. WILLIAMS, Village Clerk, Respondent.

September 29—October 18, 1904.

Certiorari *to nonjudicial bodies: When evidence reviewed: Taxation: Valuation by assessor: Board of review: Weighing evidence: Presumptions: Courts: Appeal and error: Supervisor of assessments: Witnesses: Competency.*

1. The scope of the writ of *certiorari* to a nonjudicial body is not as broad as a writ of error as to permitting a review of evidence, and if there is reasonable ground for belief that the body's conclusion is the result of honest judgment it cannot be disturbed.
2. A nonjudicial body, up to the dividing line between error in the exercise of discretion and judicial error, has ample opportunity to make erroneous decisions, from which the aggrieved party has no opportunity for relief. If a remedy should be afforded, it is for the legislature to provide, and not for the courts by changing the scope of the common-law writ of *certiorari*.
3. On *certiorari* to a board of review, in the absence of evidence to impeach it, the assessor's valuation is presumed to be correct, and, upon the evidence produced to support or overcome that presumption, no mistake or error of the board, honestly made in deciding thereon according to their judgment, warrants judicial review of the decision.

4. In such case, the court must look into the evidence far enough to see whether in any reasonable view thereof, in the light of correct rules of law, it furnished a substantial basis for the board's action, and, having discovered that, the court has exercised its legitimate function in respect thereto.

5. Where the trial court on *certiorari* to a board of review has passed adversely to the contention of relator, on appeal the want of legitimate basis in the evidence for the board's decision must appear very clearly and satisfactorily, although the decision may seem clearly against the great preponderance of the evidence.

6. In proceedings before a board of review to reduce the assessor's assessment, the board is not bound to accept as true the evidence upon one side or that of the other, but may, in the exercise of its judgment, disregard the evidence on both sides, and fix a valuation between the two extremes.

7. In proceedings before a board of review to reduce the assessor's valuations, one item was a sawmill. The evidence of the owner bore mainly on what the sawmill property was worth to disorganize it and dispose of its parts. The testimony chiefly relied upon by the board to support the assessor's valuation was what the property, as an entirety, and as a going concern, would ordinarily sell for at private sale, assuming that a buyer, with the same opportunity for the use of the mill as the present owner, was at hand and had the means to buy it. *Held*, that the evidence to support the assessor's valuation was much nearer the statutory basis prescribed by sec. 1052, Stats. 1898, i. e., the full value that could ordinarily be obtained for the property at private sale.

8. In proceedings before a board of review to reduce the assessor's valuation, one item was a stock of lumber. The result testified to by a witness produced by the relator and witnesses produced by the assessor varied several million feet, but neither of the results was more than an estimate. *Held*, that while the method of estimation adopted by the relator's witness appeared better calculated to reach a correct result, it could not be said that the method adopted by the assessor was so unlikely to reach an approximately correct result that the evidence thereof was not entitled to consideration, and hence the board was not without warrant in reaching its conclusion.

9. In proceedings before a board of review to reduce the assessor's valuation, one item was the value of relator's sawlogs. Relator estimated the amount thereof on May 1, by taking from the log stock secured for the season, the amount of lumber manufactured therefrom, on an estimated cut of the mill

per day. Relator did not furnish any evidence of the lumber actually cut out of the logs, nor any evidence of how the scale of the lumber compared with the log scale. The assessor made his valuation on an estimate from inspection and statements of the relator's agents. *Held*, that the board were not entirely without warrant in reaching the conclusion which they did, and that their valuation should stand.

10. The supervisor of assessments is not authorized to make assessments, or substitute his judgment for that of the assessor.

11. A supervisor of assessments is a competent witness to give testimony before a board of review, and the fact that in giving his testimony he was in the attitude of supporting his own judgment, recorded in the assessment roll, goes to the weight of his testimony, but not its competency.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Certiorari to the board of review of the village of Fairchild to obtain an examination of its proceedings respecting the assessment for taxation of the property of the *N. C. Foster Lumber Co.*

The facts involved in the litigation, so far as necessary to an understanding of the questions examined and decided, are sufficiently referred to in the opinion.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

For the respondent there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

MARSHALL, J. This appeal involves the question of whether the board of review of the village of Fairchild committed jurisdictional error in valuing the relator's property for taxation. We have a long record before us. There are some 300 printed pages of evidence upon which the board made the decision complained of. It is claimed that such decision on many points is so manifestly wrong as to be jurisdictionally defective. We are urged to examine the evidence in detail, to review and weigh it to determine whether it preponderates in favor of or against the board's conclusion. We

have responded thereto as fully as the nature of the case will permit. We have not gone as far as requested because settled legal principles barred the way.

Before giving attention in detail to the valuations complained of, it seems best to consider the proposition advanced by counsel as to the rule to be observed. It is contended that the scope of the writ of *certiorari* to a nonjudicial body, as in this case, is as broad as a writ of error, as to permitting a review of evidence. While the learned counsel refer to many of our recent decisions to sustain that, they are not understood here to have that effect. In a number of instances the question now presented was so thoroughly discussed that it does not seem that new light can be shed on the subject. It has been said over and over again in terms or in effect, in the circumstances of this case, that the board must decide on evidence and according thereto; that a decision one way where the evidence is all the other way, or to increase the value of property without evidence, or a decision so manifestly against what is clearly established by evidence as not to be, in any reasonable view, attributable to error of judgment, is jurisdictional error; and that where the board applies its judgment to the evidence and reaches a conclusion which is against the great weight of evidence, "if there be any reasonable ground for belief it is the result of honest judgment, it cannot be disturbed."

Boards of review up to the dividing line between what is called jurisdictional error, error in the exercise of discretion, and judicial error, have ample opportunity to make erroneous decisions from which the aggrieved party has no opportunity for relief. If a remedy should be afforded in such cases the only source from which it can legitimately spring is legislative power. The court cannot give it by changing the scope of the common-law writ of *certiorari*, and has never attempted to. That was very distinctly declared in *State ex rel. Augusta v. Losby*, 115 Wis. 57, 90 N. W. 188. There,

after citing numerous adjudications of this court, it was said that:

"If a board in reaching a determination is required to act upon evidence and it acts without evidence, or any evidence warranting the result in any reasonable view thereof, or if it is required to receive evidence and refuses to do so, it commits a clear violation of law and jurisdictional error, and its final determination may be challenged by a writ of *certiorari,* and held void upon that ground if the error appears of record."

In *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359, it is said in effect that, at the outset, in dealing with an assessor's valuation before a board of review "it is presumed, in the absence of evidence to impeach it, to be correct." There must be some substantial basis in the evidence to overcome that presumption, or such valuation cannot be disturbed. Upon evidence being produced in that regard to be considered with evidence supporting such presumption, and a decision thereon being made by the board according to their judgment, "no mistake or error in so doing made honestly could warrant judicial review of the decisions." The cases to the same effect in this court are numerous. *Shove v. Manitowoc,* 57 Wis. 5, 14 N. W. 829; *State ex rel. Smith v. Gaylord,* 73 Wis. 306, 4 N. W. 518; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Giroux v. Lien,* 108 Wis. 316, 84 N. W. 422; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797.

So, obviously, it is useless to make that careful study of the evidence which counsel urges us to make, for the purpose of determining whether it preponderates in favor of or against the decision of the board of review upon any particular point. We must look into the evidence far enough to see whether in any reasonable view thereof, in the light of correct rules of law, it furnishes a substantial basis for the board's action. Having discovered that, as to any matter, we shall have exercised our legitimate function in respect thereto.

Manifestly since the trial court passed adversely on the contentions of counsel, the want of a legitimate basis in the evidence for the board's decision must appear here very clearly and satisfactorily or it should stand, though it may seem clearly against the great preponderance of the evidence.

The earnest appeal of counsel for appellant for this court to broaden out the use of the common-law writ of *certiorari,* if it has not done so, to meet new conditions, said to have developed from the administration of new legislative schemes for discovering property subject to taxation, and greater pressure upon public officers than formerly in that regard, causing them to suppose themselves adversaries of property owners, instead of appreciating that their true function is to protect such owners as well as the public, and when acting as a board of review, to exercise in spirit as well as in form the judicial function, cannot, legitimately, be responded to, even if it be true that the necessity for a new remedy or the broadening out of an old one is as great as the learned counsel suggest. All the court can do is to afford to litigants the use of such remedies as the law gives. It may be that they are somewhat too limited, as regards dealing with mere legislative creations exercising *quasi*-judicial authority, such as boards of review. Though it may be that they would be found to be quite sufficient as to such boards, if property owners would more generally consider, as they should, that it is the duty of public officers, having to do with the assessment of property for taxation, to find and assess all property, made assessable by law, and instead of obstructing aid them in the performance of their important and often difficult duties, by at least making full and fair disclosures of their property, as the letter and spirit of the law requires. It is probably true that boards of review often do not appreciate that the law requires on their part the exercise of judicial functions to the end that the interests of the property owners as well as those of the public, may be properly guarded, and that they assume an air

of suspicion and hostility toward such owners. It is quite as likely, however, that such attitude is induced by an air of apparent hostility on the part of such owners. But it is by no means improbable that the present legislative plan would be ample to vindicate the rights of all, with reasonable certainty and satisfaction, if the boards of review would so administer it, and property owners would so submit thereto as to give full effect to the same, instead of violating it by assuming an attitude of hostility, each toward the other. However it might be, as before indicated, this court cannot extend the ancient scope of the common-law writ of *certiorari* to remedy the difficulties complained of in this case and similar difficulties said to exist. If, as counsel argue, "it is useless to review the evidence, if after doing so, the court is powerless to grant relief against a decision which is contrary to the clear preponderance of the evidence," then the practice of all the courts in the land in the use of the writ of *certiorari* and the writ of *habeas corpus* and in the treatment of findings of fact by juries is all wrong. As before indicated, any reformation in that regard, if the exigencies of the present condition require one, must come from the lawmaking power, not from those charged with applying the law as they find it.

Several instances are cited to our attention where the assessor's valuation was corroborated by evidence, while there was evidence on the part of the relator establishing, if true, a much lower one, and the board did not adopt either, but decided upon a valuation between the two. The idea of counsel is, as we understand it, that the board was bound under such circumstances to accept as true, the evidence upon one side or that upon the other, and to do neither by fixing a value between two extremes was not an exercise of judgment, but an arbitrary conclusion disregarding the evidence on both sides. If that be correct then most of the decisions upon matters of fact by boards and juries and judges, especially where the decisions are necessarily based on opinion evidence, are arbitrary.

Counsel's proposition is wrong,—manifestly so. True, when the nature of a controversy is such that the truth is easily determinable to a reasonable certainty by mathematical demonstration, and the body called upon to decide proceeds otherwise to an erroneous result, there is no room for saying that such result was reached by the exercise of judgment. An instance of that is found in *New Home S. M. Co. v. Simon,* 107 Wis. 368–379, 83 N. W. 649. But on questions of damages, necessarily determinable on conflicting opinion evidence, the universal practice is to determine the truth of the matter by the exercise of judgment within the range thereof.

Serious complaint is made of the action of the board in deciding upon the assessable value of the relator's sawmill property. It is said that the evidence on relator's side was consistent with the statutory basis for valuing the property, while that in support of the assessor's valuation was on an illegitimate basis. True, as counsel claims, in such circumstances there is no conflict and the evidence on the side supporting the correct theory should be regarded as the sole evidence to base a decision on. *Batavian Bank v. North,* 114 Wis. 637, 90 N. W. 1016. But we are unable to discover that the situation which counsel suggests existed. The evidence on the relator's part bore mainly on what the sawmill property was worth to disorganize it and dispose of the parts. That on the other side bore mainly on what the property was worth as an entirety and in its going condition. The relator and his witness testified that there was but little timber tributary to the mill; that it would probably not run for more than a year, and that the machinery would not sell for more than from $6,000 to $8,000. One witness testified that he would make no difference, in valuing the property, whether there was or was not further use for the mill in its then location, showing clearly that his valuation was fixed solely in contemplation of what could be obtained for the machinery by disorganizing the plant. That was not a fair way to determine the value of the

property. It was very far from the statutory basis. It would not, if adopted by the board, have resulted in valuing the mill plant at all. The proper way was to consider the plant as an entirety, the mill, the land upon which it was located, the planing mill, the lumber yard, the means of reaching the plant with logs and moving the lumber therefrom and all the accessories and things for and in use in and about the property and belonging thereto, or affecting its value, including of course the facilities for obtaining logs to keep the mill in operation. The ultimate standard of value was "the full value that could ordinarily be obtained for the property at private sale." In reaching that necessarily one had to consider that the property derived its value largely from its character as a combination fitted for a manufacturing industry, its location, the opportunity to continue such industry, the advantage of doing so and many other circumstances. The statute, sec. 1052, Stats. 1898, so provides. The idea that a sawmill property, costing $29,000 for the erection of the mill itself, with its lumber yard, planing mill and all that goes to make up a complete plant in a going condition, with the certainty of there being use for it for a year at least, possibly longer, should be valued on the basis of what the machinery would sell for, is certainly not consistent with the statutes. What could ordinarily be obtained for the plant under all the circumstances, that was the question, not what could be obtained for the material composing it. The evidence on the part of the relator did not present any definite basis in that regard. Counsel says that the evidence to support the assessor's valuation was on an entirely wrong theory. In our view it was much nearer the legitimate basis than that on the part of the relator. The witness chiefly relied upon by the board, when pressed to state what standard he adopted in giving his valuation, said it was "what the property would ordinarily sell for at private sale, assuming that a buyer, with the same opportunity for the use of that mill as the present owner, was at

hand and had the means to buy it." The assumption in that hypothesis, that property valuable to one would be of substantially the same value to another, under the same circumstances, and that where one controls, for the purposes of sale, both the property and the circumstances affecting its value so that he can sell the former with the advantage of the latter, can ordinarily obtain at private sale the value, having reference to such circumstances, and that where there are sellers of property there are ordinarily customers, is by no means unreasonable. The evidence in support of the valuation placed on the property by the assessor was much more helpful than the evidence produced by the relator. We shall not discuss the evidence on either side in detail. Since the contention of counsel that the evidence on the part of the relator established the value of the property on a correct basis, and that the opposing evidence was on an entirely wrong basis, must be disapproved; and the contention that we can legitimately overturn the decision of the board upon coming to the conclusion that the evidence merely preponderates against it must be disapproved, there is nothing left that need be said. Assuming such two propositions to be wrong, it would doubtless be conceded that there is some legitimate basis to be found in the evidence for the conclusion which the board of review reached.

Particular complaint is made of the decision of the board as to the valuation of the lumber stock which the relator had on hand May 1, 1903. In support of the assessor's valuation evidence was given by witnesses who counted the lumber in a few of the full piles and determined the average amount in such a pile, and applied that standard to the number of like piles which, in their judgment, all the lumber in yard would make, taking a general view of and counting up the broken piles to enable them to make an estimate in that regard. The relator gave evidence by a witness who claimed to have estimated the lumber by treating every pile in the same manner the other witnesses did the few in order

to obtain a basis as aforesaid, finding by that method 7,211,270 feet. The amount found by the other witnesses was 10,493,600 feet. Neither of the results could be called more than an estimate. True the method adopted by the relator's witness was better calculated to reach a correct result than the other, but it was only an estimate. If the result by one method had not been much different from that by the other it is quite likely that the board would have reached a different conclusion than it did. We cannot decide that the one adopted by the assessor and his assistant was so unlikely to reach an approximately correct result that the evidence thereof was not entitled to consideration at all. The difference between the two estimates was so large that the board may have concluded that it was not reasonably attributable to a faulty method by the assessor but happened through mistake, either by the witness upon one side or witnesses on the other.

Another of the most important decisions complained of by the relator is one in respect to the value of his sawlogs. He estimated the amount thereof on May 1, 1903, by taking from the log stock secured for the season, being 8,187,770 feet, the amount of lumber manufactured therefrom, on an estimated cut of the mill from such logs of 50,000 feet per day for the time the mill was operated prior to May 1, 1903, making 5,300,000 feet, leaving a balance of logs subject to assessment of 2,887,770 feet. He said the entire cut of the mill was from 70,000 to 90,000 feet per day, and that he estimated the logs in question furnished 50,000 thereof. It will be seen that such evidence did not furnish a very definite basis for a decision. It did not furnish a much more satisfactory basis, if any, than the evidence produced in support of the assessor's valuation of an estimate made by taking a general view of the logs. Some criticism is made of such evidence. Without referring to it in detail, the general effect thereof, in our judgment, is that the estimate

made by the assessor was on such a view as the one suggested. The relator did not furnish the board any evidence of the amount of lumber actually cut out of the logs, nor any evidence of how the scale of the lumber compared with the log scale. That it ordinarily does not compare very accurately is notorious among people at all familiar with such matters. A twenty per cent. overrun in lumber from the log scale made by Scribner's rule, which may have been the case, would explain the difference between the assessor's and the relator's estimate, if the amount of lumber cut out of the log stock was as the relator testified. Enough has been said on the subject to indicate clearly that the board was not entirely without warrant in reaching the conclusion which it did.

It does not seem necessary to further review in detail the conclusions reached by the board of review, which the relator complains of. The evidence as to each has been sufficiently examined to enable the court to see that in all instances where the board made a decision in respect to any matter complained of, it had some legitimate ground therefor. We have not overlooked counsel's complaint that the supervisor of assessment was really the assessor, and was permitted to furnish evidence before the board of review to sustain his work. True, such supervisor had no business to make the assessment of the relator's property, or any other property. When he took the place of the assessor and substituted his judgment for that of the proper officer he went outside of his legitimate sphere. The law contemplates now, the same as it did before there was any supervisor of assessment, that the assessment of property for taxation shall be made by the assessor. However, the supervisor was a competent witness to give testimony before the board of review. The fact that in giving such evidence he was in the attitude of supporting his own judgment, recorded on the assessment roll, went to its weight, but not its competency.

By the Court.—The judgment is affirmed.

THE STATE EX REL. FOSTER, Appellant, vs. WILLIAMS, Village Clerk, Respondent.

September 29—October 18, 1904.

Taxation: Assessor: Board of review: Prima facie *assessment: Impeachment: Evidence: Statutes: Judgments: Practice.*

1. Where no affidavit fixing the amount of relator's property was delivered to the assessor until long after the assessment roll had been delivered to the board of review, the true assessment, which is *prima facie* correct, is that fixed by the assessor, which relator has no right to have reduced except upon evidence reasonably tending to show that it was excessive.
2. Where evidence offered to show an excessive assessment is that of the taxpayer's own agent, it is to be construed most strongly against him.
3. Relator was assessed by the assessor for moneys, accounts, credits, bonds, notes, and other securities, after deducting *bona fide* debts, $5,000. The testimony of relator's agent before the board of review went no further than to deny any credits, other than an average indebtedness of about $300 due relator each month from a corporation. It developed that relator had received shortly before the year under consideration a sum of money, alleged to be about $10,000, which amount relator's agent failed to contradict, and there was nowhere in the testimony any denial that this money, or a considerable portion thereof, was still in relator's possession during some or all of the year preceding the assessment. The board of review reduced the assessment to $2,000. *Held*, that the evidence tended, though not conclusively, to establish that the original assessment was wrong, and justified the board of review in making some reduction.
4. Under sec. 2, ch. 284, Laws of 1903 (providing that no person shall be allowed in any action or proceeding to question the amount or valuation of personal property assessed to him unless in person or by agent he shall have first presented his objections thereto before the board of review in the district in which such assessment was made and in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath, of all his personal property liable to assessment in such district and the value thereof), if the taxpayer objecting to the assessor's assessment refuses in any degree to answer fully such

inquiries as may tend to develop what property he deems not liable to assessment, and as may test the accuracy and credibility of the statement he volunteers, the statute denies him the benefit of the statement he chooses to make.

5. On *certiorari* to review the action of a board of review in dealing with relator's assessment of personal property, the testimony of relator's agent is *held* to warrant a denial of relief in deference to sec. 2, ch. 284, Laws of 1903.

6. In such case, where judgment of affirmance of the action of the board of review was warranted by the record, that action will not be disturbed because the trial court's reasons would have resulted in dismissal.

Appeal from a judgment of the circuit court for Eau Claire county: James O'Neill, Circuit Judge. *Affirmed.*

Writ of *certiorari* to bring up action of the board of review of the village of Fairchild, Eau Claire county, with reference to personal property assessment upon the relator. By the return it appeared that the assessment roll returned to the board of review on the last Monday in June, 1903, contained an assessment against the relator for "net amount of moneys, mortgages, accounts, credits, bonds, notes, and other securities, after deducting *bona fide* debts, $5,000." On July 28th, N. C. Foster, as agent for the relator, his daughter, appeared before the board, and filed a written affidavit of the form required by statute for delivery to the assessor, stating certain amounts in each calendar month of the year preceding May 1, 1903, and showing an average of $304.11 under the heading, "Average Amount of Moneys, etc." He was put under oath, and testified that this was merely a statement of the sums due each of these months from the N. C. Foster Lumber Company to relator; that she had no other investments or money due her. He was asked whether he did not make an affidavit that during the previous year she had received some $10,900 in money from that company; admitted that he made some affidavits, and that she received some money, but denied remembering how much; said he knew what she did with her money, and

then refused to answer what she had done with that. It also appears that in presenting the above-mentioned affidavit at the meeting of the bard of review it was handed to the assessor. The board reduced the assessment from $5,000 to $2,000. The circuit court entered judgment of affirmance, from which the relator brings this appeal.

For the appellant the cause was submitted on the brief of *Bundy & Wilcox.*

For the respondent there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

DODGE, J. The true assessment, which was *prima facie* correct, and which relator had no right to have reduced, except upon evidence reasonably tending to show that it was excessive, was $5,000; for it does not appear that any affidavit fixing any other amount was delivered to the assessor until long after the roll had been delivered to the board of review, and thus passed out of his control. *State ex rel. Giroux v. Lien,* 108 Wis. 316, 84 N. W. 422; Id., 112 Wis. 282, 87 N. W. 1113. The evidence offered, being that of the relator's own agent, is, of course, to be construed most strongly against her. It went no further than to deny any *credits* held by her other than the indebtedness of the N. C. Foster Lumber Company; but it developed that she had received shortly before the year under consideration a sum of money, and from the failure of the relator's agent to contradict the amount of $10,000 or more, specified in the question put to him, it is a fair assumption that such amount was not far wrong. There was nowhere any denial that this money, or a considerable portion thereof, was still in her possession during some or all of the year preceding May 1, 1904. In this state of the record, it certainly cannot be said either that the evidence was conclusive and undisputed that the sum of $304 measured the average amount of *moneys* and credit items possessed by relator during the year, nor,

indeed, that it conclusively established that the original assessment of $5,000 was wrong. In this connection, however, it may be said that it may have tended, though not conclusively, to establish the last-mentioned fact; thus justifying the board of review in making some reduction from the assessment.

There is another reason why relator cannot prevail in this proceeding, namely, the prohibition thereto enacted by the last legislature (sec. 2, ch. 284, Laws of 1903):

"No person shall be allowed in any action or proceeding to question the amount or valuation of personal property assessed to him unless in person or by agent he shall have first presented his objections thereto before the board of review in the district in which such assessment was made and in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath, of all his personal property liable to assessment in such district and the value thereof."

This statute marks a policy worthy of commendation and of cordial support from all citizens—of course, from courts. Whatever may be thought of the wisdom of laws attempting to class credits with other property for taxation, none can differ as to the importance that such taxation, if imposed, falls as nearly equally upon such property as its inherent difficulties will permit. Those difficulties are such as to render much inequality, probable at the best, with resultant debauchment of the popular moral sense of the obligation of each to contribute toward the expense of government in the proportion fixed by law. Though one may doubt the wisdom of the inquisitorial methods necessary to even approximate equality in discovery and assessment of such class of property, we must recognize that the attempt at such result imposes work of utmost difficulty on the public officers charged therewith. Assuming, as we must, that they honestly attempt to perform their duty, they and the public are entitled that they shall not be successfully attacked in court

without full and frank disclosure from the taxpayer of the superior knowledge which he necessarily has upon the subject. It is perhaps utopian to expect of human selfishness voluntary original information of the amount of such invisible and intangible assets upon which the law would burden the owner with taxation, but when one presents himself to give evidence against the amount which the assessor has fixed in the light, or obscurity, which necessarily surrounds him, it is but right that the taxpayer furnish all the enlightenment in his power without evasion or concealment. It is easy for such protestant to assert, even on oath, that he has no more than a specified amount of such assets "liable to assessment;" and yet, in liberality of construction in his own favor, to omit much that another, though less friendly, construction of the law would render liable. The policy of this statute is that none shall be permitted to stop with such negative pregnant generalizations; that, to render such testimony conclusive upon the board of review, and ultimately upon the government, he shall answer fully to such inquiries as may tend to develop what property he deems not liable to assessment, as also to test the accuracy and credibility of the statement he volunteers. If he refuses this in any degree, the statute very properly denies him benefit from the statement he chooses to make. It cannot be doubted that the conduct of relator's agent disclosed by the record before us brings her within the denunciation of this statute. It is hardly possible that his denial of memory whither she received so large a sum as $10,000 in 1901 was other than evasive. Of course, he may not have remembered the amount exactly, but the general *non mi recordo* could but be, in effect, a refusal to give approximate information which must have been within his knowledge, and his memory also, as the latter might easily have been refreshed. Further than this, however, was the absolute refusal to give information, confessedly possessed by him, as to how such moneys had been disposed of, thus block-

ing the inquiry whether they had been disposed of at all, or were still in relator's possession during the year 1902. The circuit judge, as declared in an opinion filed, denied relator relief in deference to this statute, which action meets our entire approval. If that were the sole ground of such denial, however, there might be question whether a judgment of affirmance were proper—whether the relator should not, merely according to the statute, have been precluded from questioning the assessment by an order dismissing the proceedings. Since we have found, however, that judgment of affirmance was warranted otherwise by the record, that action cannot be disturbed because the trial court's reasons would have resulted merely in dismissal. *State ex rel. Gray v. Oconomowoc*, 104 Wis. 622, 629, 80 N. W. 942.

By the Court.—Judgment affirmed.

ROBERTS, Respondent, vs. FRANCIS, Appellant.

September 29—October 18, 1904.

Production of papers: Order: Enforcement: Abuse of discretion: Evidence: Witnesses: Appeal and error: Principal and agent: Exchange of property: Authority: Presumptions: Ratification: Replevin: Tender.

1. In an action of replevin defendant procured an order under sec. 4183, Stats. 1898, requiring plaintiff to deposit certain documents with the clerk of the court between the hours of nine and four of the following day. This order was served on plaintiff's attorney the day of its date, who forthwith filed an affidavit that he had no such documents in his possession, nor any knowledge concerning them, that plaintiff was not within Wisconsin, but was in the state of Minnesota, and for these reasons he could not comply with the order. The order was never served on plaintiff. He was first informed of its existence while testifying upon the trial, and defendant examined plaintiff fully as to the contents of the documents. *Held*, that the defendant was not in a position to insist upon the produc-

tion of the documents, and in default thereof that plaintiff be punished.

2. In such case, under the facts stated in the opinion, there was no abuse of discretion in the refusal of the court to enforce such order.
3. When an examination of the evidence discloses no direct or circumstantial proof conflicting with plaintiff's claim of ownership of property in question, nor that his testimony is the only proof on that subject, it is not error to refuse to submit the question of ownership to the jury.
4. The failure of the plaintiff to produce certain documents, is *held*, under the circumstances stated in the opinion, not to raise a presumption that the documents would furnish proof against the claims of plaintiff.
5. While the facts of possession and control of a principal's property by an agent may be evidence to show authority to sell, such evidence cannot be made the basis of a presumption that the agent might exchange the property of his principal, whereby the transferee, claiming through the transaction, can resist recovery of it by the true owner.
6. Ratification of a transfer of property by an agent cannot arise while the principal is in ignorance of the transaction, and when, after knowledge of the transfer, it is persistently repudiated.
7. Where an agent has made a transfer of his principal's property in exchange for other property, and the transferee refuses its surrender, but claims to hold and retain it as owner under the transfer, it is not necessary for the principal to tender return of the property received by his agent before commencing an action of replevin.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Plaintiff commenced an action of replevin April 28, 1903, to recover possession of a French coach stallion, alleged to be worth $2,500. The sheriff took the horse from defendant's possession and delivered it to the plaintiff, and he retained it up to the time of the trial. The plaintiff alleges that he is the owner of the horse, and had owned it for many years prior to the commencement of the action; that it and other horses owned by him had been kept on a farm in Minnesota in the possession of his brother, Nathan Roberts, for several years

past; that on or about March 9, 1903, one James G. Hanan unlawfully took possession of the horse for the Westfield Importing Company, and turned it over to defendant, by whom it was unlawfully detained from plaintiff's possession, to his damage. The defendant denied plaintiff's claims, and asserted that he was lawfully in possession of the horse. Upon the trial it appeared that the horse is one which the plaintiff had shipped with other horses in the spring of 1901 from his ranch in Texas to the Roberts farm in Goodhue county, Minnesota. Nathan Roberts, plaintiff's brother, kept this horse on this farm, with the privilege of using him for breeding purposes, and he was authorized to sell the stock so shipped to the farm, except this and another French coach stallion, which he was informed plaintiff wished to keep and retain. On March 9, 1903, Nathan traded the horse in question, with another French coach stallion, to the Westfield Importing Company, as his own property, receiving therefor a stallion named Myron, and other consideration. This trade was negotiated for the Westfield Importing Company by N. W. Green and James G. Hanan, representing the company. The horses were exchanged under this trading contract on March 9, 1903, and possession delivered of the respective horses to the parties to the trade. Plaintiff testified that he received a letter from his brother, Nathan, about the 10th of March, 1903, which informed him that Nathan had a chance to trade the two French coach stallions for a Percheron stallion, and that a stock company was being organized among the farmers of Nathan's community for the purchase of this horse at the price, as he recollected, of from $2,000 to $2,500. He received two telegrams some time thereafter informing him of some difficulty about these French coach stallions, and advising him in the last one to come and replevy them. The last message reached him on the day before he left Texas for Minnesota and Wisconsin, where he arrived about the 19th of April. He testified further that he received this message be-

fore receiving a second letter from Nathan on the same day; that he did not reply to either of these messages or the last letter; that upon arrival at Nathan's place he learned for the first time that Nathan had traded these two stallions to the importing company; that he immediately made search for his horses, and, upon discovering that this one was in the possession of defendant, demanded its return; and that Mr. Hanan, the representative of the importing company and the defendant, refused to comply with the demand. Mr. Hanan testified that he dealt with Nathan Roberts in the understanding and belief that Nathan was the owner of these French coach stallions, and he informed plaintiff that he had nothing to do with him and that he would not recognize him in the transaction. Hanan insisted that the bill of sale signed by Nathan, conveying these horses, transferred title to the importing company, for which he acted, and that the sale of the horses to the company by Nathan Roberts would be relied upon as establishing the ownership of the horses in the importing company. On October 8, 1903, defendant petitioned the court for an order directing plaintiff to deposit the correspondence between himself and Nathan for the months of March and April, 1903, with the clerk of the circuit court for Eau Claire county on the following day, and that he produce the correspondence upon the trial of the case. This order was made and served on plaintiff's attorney at the city of Eau Claire, October 8th, and he immediately filed an affidavit stating that he had no such correspondence in his possession, and that plaintiff was not then in the state of Wisconsin, but in the state of Minnesota. Plaintiff and his attorney attended the taking of Nathan Roberts' deposition in Minnesota on October 10, 1903. The case was taken up for trial on the 16th of October following. The correspondence referred to in the order was not produced at the trial. Plaintiff testified that he had never been informed of the court's order to produce the correspondence; that if the correspondence was in existence

it was in the state of Texas, and that he did not understand that it was material in the case; and that he was not advised, and did not understand, that it was necessary to produce it. It is without dispute that whatever horses plaintiff had in the state of Minnesota were in the charge and the possession of his brother, Nathan Roberts, and under his management and control. At the conclusion of the taking of the testimony the court directed the jury to return a verdict for the plaintiff, finding that plaintiff is the owner of the horse, that defendant unlawfully detained the same, and that plaintiff recover nominal damages. It was not disputed but that the horse was worth $2,500. Judgment was awarded on this verdict for the recovery of the horse, for damages, and costs, and from such judgment this appeal is taken.

For the appellant there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

W. H. Frawley, attorney, and *Carl C. Pope,* of counsel, for the respondent.

Siebecker, J. Error is assigned upon the action of the court in refusing to enforce its order requiring the production of the correspondence between plaintiff and his brother, Nathan Roberts, from March 9, 1903, to the commencement of the action. As shown in the statement of facts, this order was obtained by defendant on October 8, 1903, and was served on plaintiff's counsel the same day. It required the production of the correspondence at the trial, and that it be filed with the clerk of the court between the hours of nine o'clock and four o'clock of the following day. Plaintiff's counsel filed his affidavit with the court on October 9th, admitting service of the order, and stating that he had no such correspondence in his possession, nor any knowledge concerning it, and that plaintiff was not then within the state of Wisconsin, but was in the state of Minnesota, and for these reasons he could not comply with the order. The order was not served on plaint-

iff; he was first informed of its existence while testifying upon the trial. Defendant examined plaintiff fully as to the contents of this correspondence. Under these circumstances defendant was not in a position to insist upon the production of the correspondence, and in default thereof that plaintiff be punished. It rested in the sound discretion of the trial court to determine whether plaintiff's conduct merited the imposition of any penalty. The court held that the order ought not to be enforced, as requested. We cannot say that such action was an abuse of its discretion under sec. 4183, Stats. 1898. *Treleven v. N. P. R. Co.* 89 Wis. 598, 62 N. W. 536.

Appellant insists that the question of the title and ownership of the horse should have been submitted to the jury, for the reason that the proof of title rested solely on plaintiff's testimony. It is argued that this question should have been submitted to the jury under the evidence, for the reasons that he is an interested party, and that his testimony had been shown to be false in material respects and impeached by material facts and circumstances. An examination of the evidence discloses no direct or circumstantial proof conflicting with plaintiff's claim that he is the owner of the horse in question, nor is his evidence the only proof on the subject. Nathan Roberts, who testified in behalf of the defendant, made no claim or assertion to ownership of the horse. His testimony pertaining to the transactions between himself and plaintiff concerning this horse tends to corroborate plaintiff's claim of title. It is true, plaintiff's evidence is that of an interested party, but it appears to give a detailed and consistent narrative of all the material facts, without evasion, and it does not furnish indications of improbability or unreliability. The fact that Nathan Roberts had possession of this and other horses is, under the circumstances shown, in no way inconsistent with plaintiff's ownership and Nathan's possession for the purposes claimed.

It is asserted that it clearly appeared that he testified

falsely concerning the contents of the correspondence, but we find no reliable ground for this claim. The fact that the witness Green testified that he told Nathan Roberts what to write to plaintiff in the letter of March 10, 1903, is not of such probative force as to warrant the conclusion that plaintiff's testimony of the contents is false, in view of the fact that it appears that Mr. Green does not know of his own knowledge what were the contents of this letter. Other instances cited to our attention as impeaching plaintiff have been examined, and we find nothing which would justify the trial court and the jury in disregarding the testimony of plaintiff, in passing upon these issues, nor was there such conflict in the proof of title as to present any other reasonable inference than that plaintiff is the true owner of the horse.

There is no evidence that the sale by Nathan Roberts to the Westfield Importing Company was within his actual authority, but it is contended that it was within his authority, as plaintiff's agent, under the facts and circumstances of the case. It is argued that plaintiff's failure to produce the correspondence amounts to a wilful suppression of documentary evidence, and tends to show such authority. As we have stated, the record is bare of anything showing that plaintiff suppressed this evidence. His explanation as to why he did not produce it is reasonable and entitled to credence. Nor does it lie with defendant to assert this claim, in view of the procedure taken by him under the statute, as above indicated, and the course adopted by him upon the trial in seeking to show the contents of these documents by plaintiff's evidence, which he apparently gave with the utmost freedom and to the best of his recollection. Under these circumstances, no presumption will be indulged that the contents of the letters would furnish proof against the claims of plaintiff.

It is insisted, if plaintiff gave no actual authority to sell these horses, that Nathan had an implied authority to dispose of them as he did. This is predicated upon the facts

showing that the horses were in the possession of Nathan for a number of years; that he handled and treated them and appeared to exercise control over them as owner. While the facts of possession and control of a principal's property by the agent may be evidence tending to show authority to sell, there is no implication that he is authorized to deal with it in any other way. Such proof is never made the basis of a presumption that the agent might exchange the property of his principal, and a transferee claiming through such a transaction cannot resist recovery of it by the true owner. *Mechanics' Bank v. N. Y. & N. H. R. Co.* 13 N. Y. 599, 633; *Wheeler & W. Mfg. Co. v. Givan,* 65 Mo. 89; *Trudo v. Anderson,* 10 Mich. 357; *McCreary v. Gaines,* 55 Tex. 485.

The claim of ratification cannot arise, for the reason, as heretofore indicated, that plaintiff had no knowledge of this transfer until after he arrived in this state on April 20, 1903, and thereafter he persistently repudiated the trade made by his brother.

It remains to ascertain whether plaintiff could maintain this action without an actual return of the horse received by his brother from the Westfield Importing Company. When he notified Mr. Hanan, the representative of the company, that he was the owner of this horse, and demanded its return, he was informed by the company's representative that it refused to surrender the property, and would hold and retain it as owner under the trade with Nathan Roberts, notwithstanding the claim he made as to the true owner. This claim of the company has been consistently maintained to the present. The defendant simply acted for the company. This attitude of the defense clearly shows that the company, through its representative, refused to receive back the horses they had parted with upon any condition, and an attempt to make actual return of the horse delivered to Nathan Roberts by the company would have been an idle and useless ceremony. Under these circumstances the plaintiff is relieved

on this ground the defendant challenges the legal sufficiency of the complaint.

The simple question presented is whether it is necessary for the plaintiff in his complaint to allege the making and filing of the clerk's return in response to the appeal. The demurrant's contention is that the filing of the return is jurisdictional; that, until the return is filed, the court cannot proceed; nor is a cause of action stated, because the statute provides that upon the filing of the return "such appeal shall be entered, tried and determined in the same manner as cases originally commenced in the circuit court." Laws of 1889, ch. 184, subch. VII, sec. 25. This court has said in a number of cases that in actions of this kind the complaint should allege the facts made requisite by the charter to give the court jurisdiction (*Watson v. Appleton,* 62 Wis. 267, 22 N. W. 475; *Koch v. Ashland,* 83 Wis. 361, 53 N. W. 674), and has also said that an appeal from a decision of the county board cannot be said to be pending in the circuit court, within the meaning of sec. 2811*a,* Stats. 1898, until the return of the county clerk is filed in court in response to the appeal. *Rice v. Ashland Co.* 108 Wis. 189, 84 N. W. 189. The present contention has not been made in this court before, although it would seem that among the great number of cases of a similar nature which have reached this court the objection, if tenable, would long since have been raised. However, a proposition is not to be condemned merely because of its novelty, though that fact may justify closer inspection. There is nothing in the charter of the city of *Eau Claire,* nor do we know of any general statutory provision, which requires formal pleadings to be made in the circuit court. The entire matter evidently rests in the discretion of the court. Doubtless it is wise to order the making of formal pleadings in such cases, but the refusal to require formal pleadings could hardly be assigned as prejudicial error unless it appeared that the discretion vested in the court was abused. As the jurisdictional facts

relating to the proper taking of the appeal will always appear from the return, and thus be within the court's knowledge, it may perhaps be doubtful whether it was wise or helpful to require that the complaint should state them. But, as this question has been settled by the cases cited, and we do not care to disturb the rule, we shall not discuss it. The question is, what are the facts made requisite by the charter to give the court jurisdiction? We are not inclined to give these words a signification any broader than necessary. It must be conceded that the action cannot be tried in circuit court until the return is made. The action is not pending, for the purposes of trial at least, until the filing of the return. This must be so not only as the result of the ruling in *Rice v. Ashland Co., supra,* but also from the language of the charter before quoted. But it is inaccurate to say that, because the court has no power or jurisdiction to try and determine the cause, it has no jurisdiction to do anything in the action. It may have jurisdiction for some purposes, though not for the trial. Thus, in case of an appeal from justice's to circuit court the latter court cannot proceed to try the cause until the return of the justice is made, but it may make an order *in the cause* compelling a return. *Bruins v. Downey,* 45 Wis. 496. So we have no doubt in the present case, if the city clerk neglects or refuses to make his return, the circuit court could make an order *in the case* requiring the return to be made, and not drive the plaintiff to the necessity of commencing a separate action of *mandamus.* This can only be possible on the ground that the court has jurisdiction for some purposes upon the perfecting of the appeal, although not for trial of the case until the return is filed.

We do not feel disposed to place any greater burdens on litigants in the matter of drawing their complaints than necessary. It seems quite onerous enough that they are obliged to set forth all the facts necessary to make a complete common-law or statutory cause of action and to show a perfect

appeal. The complaint, we think, may well rest there. The plaintiff has taken every step required of her, and has set it forth in her complaint. The act of the public officer which is required to be performed in response to the plaintiff's acts before the case can be tried may well be allowed to be proven by the return, which is always before the court, like the officer's return on a summons.

By the Court.—Order affirmed.

LOWE, Respondent, vs. REDDAN, Appellant.

September 30—October 18, 1904.

Bills and notes: Banks: Depositors: Offset of deposits: Securities.

1. Where a depositor in a bank is indebted to the bank on a promissory note, signed also by a surety, a failure by the bank to exercise its right to offset the depositor's credit against the note does not operate as a full discharge of the surety's obligation, but only to the extent of the amount of the maker's credit with the bank.
2. In such case, where there are two notes, exactly alike, one being the note in suit, it is not error for the court to apply the maker's credit, one-half to each note.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to recover on a promissory note for $1,000. Defendant *Anthony Reddan* answered that, if liable at all, it was only as an accommodation maker; that the note was given to the Clark County Bank with another of the same character, the payee knowing his status as accommodation maker; that the due date of the note was extended by the bank for a valuable consideration, without his consent, the bank releasing to the principal debtor, J. H. Reddan, securities for the payment thereof sufficient to discharge same; and that the plaint-

iff became the owner of the note after its maturity. A formal special verdict was taken, the court, however, directing the answers to all of the questions. One, after the coming in of the verdict, was changed to accord with what the court viewed to be the uncontroverted evidence. The verdict as so corrected was to this effect. Plaintiff is the owner and holder of the note in the suit. He purchased the same after it became due. Defendant, *Anthony Reddan,* signed the note as surety only for J. H. Reddan. The Clark County Bank, the payee of the note, did not extend the time of payment. While it owned the note and another of the same character and amount, both being due, it released the sum of $259.68, which it should have applied to the payment of such note. In the order changing the verdict to the form indicated, it was recited that J. H. Reddan had on deposit in the bank when the two notes became due as aforesaid $519.36, which it should have applied to the payment thereof. Upon the fact so found and recited the court held that the defendant, *Anthony Reddan,* was entitled to the credit indicated. Judgment was entered upon the verdict so corrected, from which this appeal was taken.

R. J. MacBride and *James Wickham,* for the appellant.

For the respondent there was a brief by *L. M. Sturdevant,* attorney, and *Richard E. Smith,* of counsel, and oral argument by *Mr. Sturdevant.*

MARSHALL, J. Many questions are presented for consideration on this appeal, the solution of which does not appear to be material to the final conclusion, and will, therefore, not be discussed.

Assuming for the purposes of this case, but by no means even suggesting that such is the law, that a bank having the opportunity to protect a surety upon a note held by it, by asserting its right to offset against the same its indebtedness to the principal maker thereof upon his open deposit account;

it owes to the surety the duty to exercise such opportunity, and that a failure to do so can be taken advantage of by such surety as regards his liability to the bank, such duty is based upon mere principles of equity and cannot therefore be extended further than to fully satisfy the reason of the rule. That is fully accomplished by considering the note paid, as to the surety, to the extent of the amount of the maker's credit with the bank, which it has a legal right, at least, by asserting its right of offset, to apply thereon. To carry the rule further and hold that a mere partial release of the deposit account to the prejudice of the surety's equitable rights will operate as a full discharge of the latter's obligation, as in the case of the variation of a contract to his prejudice, the performance of which he is surety for, could only occur by confusing the legal relations between the obligee and the surety in the latter case with the pure equitable relations existing in the former case. In the latter case no contract exists between the bank and the surety upon the note, as regards the mere deposit account. None at all. Its right to protection in the circumstances stated grows out of equitable principles, as in *Plankinton v. Gorman,* 93 Wis. 560, 67 N. W. 1128. It will be observed in reading that case that, while the surety was held to have been fully released by a release of the security, the proof was that such security was sufficient, had it been enforced, to fully discharge the debt. It would seem that on principle the law must be as stated. Ample authority is cited by counsel for appellant to demonstrate that it is. *Hoyt v. French,* 24 N. H. 198; *Hurd v. Spencer,* 40 Vt. 581; *Montgomery v. Martin,* 94 Ga. 219, 21 S. E. 513; *Holland v. Johnson,* 51 Ind. 346; *Freaner v. Yingling,* 37 Md. 491; *Dawson v. Real Estate Bank,* 5 Ark. 283; *Baker v. Briggs,* 8 Pick. 122; and 1 Brandt, Suretyship, § 426. The cases to the same effect, which might be added, are numerous. The following are but a few of them: *Morgan v. Comm'rs,* 82 Ind. 257–262; *Sample v. Cochran,* 84 Ind. 594; *Weik v. Pugh,* 92 Ind. 382–

386; *Allen v. Hollingshead,* 155 Ind. 178–185, 57 N. E. 917; *Wright v. Bartlett,* 43 N. H. 548; *Calvert v. London Dock Co.* 2 Keen, 638; *Phares v. Barbour,* 49 Ill. 370; *Taylor v. Jeter,* 23 Mo. 244; *Pfirshing v. Peterson,* 98 Ill. App. 70; *Teaff v. Ross,* 1 Ohio St. 469–475; *Steele v. Mealing,* 24 Ala. 285–290; *Henderson v. Huey,* 45 Ala. 275; *Miller v. Berkey,* 27 Pa. St. 317. The following from the opinion of BLACK, C., in *Weik v. Pugh, supra,* fairly indicates the character of such authorities:

"It is a settled principle, that a surety is entitled to the benefit of all securities for the debt that are held by the creditor, and it follows from this right of subrogation that the creditor cannot, without the surety's assent, surrender, release, waste or render unavailable to the surety any of such securities, without affecting the creditor's remedy against the surety; but the surety is discharged on such ground only to the extent to which the creditor has parted with such securities."

Such cases as *Paine v. Jones,* 76 N. Y. 274; *Gardner v. Van Norstrand,* 13 Wis. 543, 544; *Sage v. Strong,* 40 Wis. 575; *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737; *Cowdery v. Hahn,* 105 Wis. 455, 81 N. W. 882, and similar authorities that might be cited, upon which counsel rely, and which seemingly, it is supposed by them, are in conflict with those we have cited, apply only, as the learned counsel for the respondent contends, to cases where the contract itself, in respect to which the surety is bound, is changed to his prejudice, without his consent. That is not this case. An entirely different rule applies to one situation than to the other. There was a claim made here that the contract between the principal maker of the note and the bank was changed to the prejudice of the surety, without his consent, by the extension of the due date of the note. On that point, however, the appellant prevailed.

Counsel for the appellant insist that, conceding the law to be as we state it, the court erred in deciding that only $259.68

of the deposit account was applicable to the note, instead of the full amount of such account, $519.36. Such contention does not seem to merit much attention. There were two notes, exactly alike, one being the note in suit. The right, as regards the deposit account, was manifestly the same in respect to one note as to the other. If, as to the surety, it should have been applied in payment of the notes, so far as it would go for that purpose, certainly the court applied it rightly, one-half to each note.

By the Court.—Judgment is affirmed.

RACINE SHOE MANUFACTURING COMPANY, Respondent, vs. BADGER MANUFACTURING COMPANY, Appellant.

September 30—October 18, 1904.

Sales: Entire contracts: Cause of action.

1. Plaintiff's assignor entered into a contract with defendant whereby it was to manufacture and deliver a certain number of pairs of shoes for resale by defendant. The contract expressly provided that defendant should pay plaintiff's assignor "as soon as it shall receive pay for the same or any part thereof, . . . and will promptly pay said second party as soon as it shall receive any money on account of said contract." There was a failure to deliver all of the shoes contracted to be manufactured, but the defendant collected all of the moneys due for the shoes actually delivered. *Held*, that the provisions of the contract, as to payment, excluded the idea that a delivery of all the shoes was a condition precedent to recovery for any portion of the shoes delivered and accepted under the contract.
2. In such case, plaintiff had the right to maintain an action for the value of the portion delivered according to the contract, less the amount which might be due to defendant for disbursements and losses.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action to recover upon contract. It appears from the complaint that plaintiff, defendant, and the Jones-Earl Shoe Company are duly organized corporations. The complaint alleges that the defendant entered into a contract with the Jones-Earl Shoe Company on October 18, 1901, for the manufacture and sale by the latter of 20,000 pairs and upwards of russet shoes for the use of the army of the United States, delivery thereof to be made in the city of Chicago, Illinois, to the quartermaster's department, under the defendant's contract with the government to furnish shoes. It is alleged that plaintiff's assignor, the Jones-Earl Shoe Company, entered upon the performance of this contract, and caused the first 20,000 pairs provided for in the contract to be delivered at the quartermaster's warehouse as agreed; and that it furnished and delivered 2,544 pairs of shoes upon the demand of the government, under an option specified in the contract to call for an additional 4,000 pairs; that the defendant has received payment for these shoes at the contract price from the government, less the extra cost the government incurred in purchasing the 1,456 pairs of shoes not furnished under the option agreement of the contract, which extra costs amounted to $262.08. It is averred that defendant received payment for the shoes delivered to the government by the Jones-Earl Shoe Company from time to time, and that defendant made payment to the Jones-Earl Shoe Company on account of these shoes, amounting to $40,500.95, and that there remains due plaintiff from defendant a balance of $7,123.09, after crediting defendant with the item of extra costs on the shoes bought by the government in the open market, as well as freight, telegram, and interest charges disbursed for the plaintiff. The complaint alleges another cause of action for money due on another contract for shoes which the Jones-Earl Shoe Company agreed to manufacture and furnish for the use of the army of the United States, to be delivered at its warehouse in Boston, Massachusetts, under a

contract between defendant and the government. The complaint sets forth the agreements pertaining to this delivery of shoes between defendant and the government and between defendant and the Jones-Earl Shoe Company, wherein the quantity of shoes, the kinds and prices thereof, were specified; and that plaintiff's assignor, the Jones-Earl Shoe Company, has furnished and delivered most of the shoes as required for which defendant received pay under the contract, and that defendant had paid on account of such delivery to the Jones-Earl Shoe Company on this contract the sum of $14,200, and that there is due the plaintiff, after allowing defendant the items of freight advanced by it, the loss incurred by reason of the nondelivery of 2,157 pairs of shoes contracted for, and some other disbursements chargeable to plaintiff, the sum of $539.17, for the goods delivered by Jones-Earl Shoe Company and accepted by the defendant. It was expressly stipulated, as shown in the complaint, in reference to payment on these contracts, as follows:

"It is further agreed that first party shall pay for said shoes to said second party as soon as it shall receive pay for the same or any part thereof, . . . and will promptly pay said second party as soon as it shall receive any money on account of said contract."

Defendant demurred to the two causes of action upon the ground that it appears upon the face of such alleged causes of action that they do not state facts sufficient to constitute causes of action. The court overruled the demurrer, and this is an appeal from the order.

For the appellant there were briefs by *Kronshage & McGovern,* and oral argument by *Theo. Kronshage.*

For the respondent there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *J. B. Simmons.*

Siebecker, J. The demurrer to the two causes of action alleged in the complaint calls for an interpretation of the contracts upon which plaintiff relies for a recovery. The defend-

ant insists that plaintiff is precluded from enforcing payment for any of the goods delivered under the contracts, because its assignor omitted to perform its part of the contracts by failing to manufacture and deliver all the shoes called for in the agreements. This claim is made on the ground that the agreements clearly show and express the intention that nothing should become due under the contracts for a delivery of any portion of the goods; in other words, it is asserted that the parties contemplated full performance in furnishing the goods called for as a condition precedent to recovery on the contracts. The contracts, however, provide for the payment of the goods delivered under them. It is stipulated that the defendant should pay for shoes furnished by plaintiff's assignor as soon as it should receive pay for the same, or any part thereof, and that it would promptly pay as soon as it should receive any money on account of the contracts. The terms of this stipulation are plain, and clearly indicate that payment should be made immediately upon the delivery and acceptance of any part of the goods, and *as soon as defendant received any money on account thereof from the government.* This manifestly excludes the idea that a delivery of all the goods was a condition precedent to recovery for any portion of the goods delivered and accepted under the contract. The parties seem to have so understood the agreements.

It is alleged that defendant made payment on goods delivered. Though the complaint does not show that these payments were apportioned to the quantity of goods delivered or money received from the government on account thereof, presumably they were made as contemplated by the stipulations, which required defendant to pay for them, or any part, promptly upon receipt of any money on account thereof. It is evident that they understood payments were to be made in instalments as delivery progressed. Under such terms of the agreement the failure to deliver a part of the goods does not absolve defendant from liability for the goods delivered, and

accepted by the government; and when it refused to pay plaintiff had the right to maintain an action for the value of the portion delivered according to the contracts, less the amounts found due defendant for disbursements and losses as specified in the complaint. 2 Mechem, Sales, § 1163; *Hoffman v. King,* 70 Wis. 372, 36 N. W. 25; *Schweickhart v. Stuewe,* 71 Wis. 1, 36 N. W. 605; *Goodwin v. Merrill,* 13 Wis. 658; *Jacobs v. Spalding,* 71 Wis. 177, 36 N. W. 608; *Ornstein v. Yahr & L. D. Co.* 119 Wis. 429, 96 N. W. 826.

By the Court.—The order overruling the demurrer is affirmed.

Dodge, J., took no part.

The State ex rel. Schaefer, Respondent, vs. Schroff, City Clerk, Appellant.

September 30—October 18, 1904.

Intoxicating liquors: License: Certiorari: ***When writ will be issued: Collateral attack.***

1. Where the record of proceedings of a common council disclosed that the whole proceeding was an inquiry and attempt to decide upon the question whether a license to sell intoxicating liquors was valid originally, or void by reason of fraud perpetrated upon the council in obtaining it, such proceeding is not an attempt to exercise the jurisdiction conferred upon the council by sec. 1558, Stats. 1898 (authorizing the revocation of a license, valid at its inception, but which, by reason of subsequent misconduct, the council is authorized to recall).
2. In such case, it is not necessary to consider whether the council acquired jurisdiction under sec. 1558, Stats. 1898, or, by improper proceeding, lost such jurisdiction.
3. Under an ordinance of the city of Racine the consent of certain neighbors was a condition precedent to the granting of a license to sell intoxicating liquors. After the granting of such a license it was assailed because such consents were obtained

by fraud and misrepresentation, whereupon the council adopted a resolution declaring such license void for those reasons. *Held*, that the license was not invalid by reason of such resolution.

4. In such case, the resolution was not subject to review on *certiorari*, since in the absence of any charter or statutory authority for the action of the common council it concluded no one, but might be attacked collaterally, and wholly disregarded by the forum in which the validity of the license might be presented for consideration and discussion.

5. A writ of *certiorari* should not issue to revoke the action of a common council when such action is so entirely beyond its jurisdiction as to be innocuous, and if issued should be dismissed upon the filing of the return.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

The relator obtained an ostensible license in July, 1903, to sell liquor in a part of the city of Racine, where an existing ordinance required the consent of certain neighbors as a condition precedent. In October it was represented to the council that such consents had been obtained by fraud and misrepresentation, and reversal of their action in granting the license was prayed; whereupon the council caused notice to be given to the relator to appear and show cause why his license should not be declared void for the specified reasons. Thereafter, in December, after some hearing and investigation, the council adopted a resolution that said license "be and is hereby declared void and of no effect, and that the city clerk be and hereby is ordered to notify said *Leonard Schaefer* of the adoption of this resolution, and, further, that the money tendered by said *Leonard Schaefer* will be returned to him." The relator sued out writ of *certiorari* to review the validity of this resolution, to which return was made by the respondent as city clerk, showing substantially the situation above stated. The circuit court held, as matter of law, that the council had no jurisdiction or power to declare said license void, except upon the grounds and by the procedure specified by sec. 1558, Stats. 1898, for a revoca-

tion, and entered judgment reversing, annulling, vacating, and setting aside the resolution of the council.

M. E. Walker, for the appellant.

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *W. D. Thompson.*

Dodge, J. We deem it entirely plain, upon inspection either of the return or petition, that the council was in no wise attempting to exercise the jurisdiction conferred upon it by sec. 1558, Stats. 1898, to revoke a license, valid at its inception, but which, by reason of subsequent misconduct, the common council is authorized to recall. The petition of neighbors, the notice to *Mr. Schaefer,* the facts investigated, and the final resolution mark an inquiry and attempt to decide upon the question whether the license was valid originally, or void by reason of fraud perpetrated upon the council in obtaining it. Hence we need not consider whether the council acquired jurisdiction to act in revocation of this license under sec. 1558, or, by improper proceeding, lost such jurisdiction. The act done was to declare that the license was, and always had been, void. And it may be conceded to the relator that there is much in the record indicating the idea, both on the part of the petitioners and on the part of the council, that such resolution might have conclusive effect as an adjudication of the invalidity of the license. As relator urges, however, there is nowhere in the statute or charter any authority given to the city council to make any such decision. Of course, there is an inherent power in the city to investigate, and to reach conclusion as to the attitude which it will take—whether to contend for the invalidity of such a license or not to make such contention; just as there is the right in any individual to investigate facts, and make up his own mind as to his attitude with reference to the legal validity of an act done by him. But, in absence of some authority of law, the city council could go no further. The license was neither more nor less

valid by reason of the resolution here assailed. Such resolution concluded no one, and might not only be attacked collaterally, but wholly disregarded by any forum in which the validity of the license might be presented for consideration and decision. To this view both parties accede, and of its correctness we can have no doubt. As a result, however, it is obvious that it does no injury to the relator. It took away no right which he previously had. Its utmost effect was to notify him that the council purposed to contend that his ostensible license was invalid. But, if that question was ever presented in a judicial forum for investigation or decision, his right to have the same tried as an independent and original one was not in any respect affected by the decision. *Certiorari* is a discretionary writ, which should issue only when necessary to prevent injustice or unlawful injury. Courts will not concern themselves, by this extraordinary writ, to declare the invalidity of nonjurisdictional acts when the relator suffers no injury thereby. *Knapp v. Heller,* 32 Wis. 467; *State ex rel. Schintgen v. Mayor,* 101 Wis. 208, 77 N. W. 167. In both of these cases the issue of the writ by circuit court was reviewed, and reversed on the ground that the cases presented failed to show equity in the relator; hence, that the issue of the writ was an abuse of the discretion of the lower court. In *State ex rel. Anderson v. Timme,* 70 Wis. 627, 36 N. W. 325, on an application to the original jurisdiction of the supreme court for a writ of *certiorari,* it was decided that the writ should not be issued, because the action of the land commissioners in investigating and declaring void a land patent was so entirely beyond their jurisdiction as to be wholly innocuous. Complete analogy exists between the action of the land commissioners there considered and the action of the council now before us; at least from the standpoint of the relator. The action in each case was wholly without jurisdiction, could be of no possible force save as the mere gratuitous declaration of the opinion of the body from which

it emanated, or at most a notification of that opinion and of their intended attitude; in one case toward the patent, in the other toward the license. We deem the reasoning of that case conclusive here—that it would be so needless an exercise of a court's power to review and pass upon the validity of that declaration that no court, in the proper exercise of its discretion, should issue its extraordinary writ of *certiorari*. Upon the same reasons it became the duty of the court, having issued the writ, upon being perhaps further enlightened as to the situation by the return, to have dismissed the proceedings.

By the Court.—Judgment reversed, and cause remanded with directions to quash the writ and dismiss the proceedings.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent, vs. CITY OF RACINE, imp., Appellant.

September 30—October 18, 1904.

Railroads: Taxation: Exemption: Former adjudication: Conclusiveness: Trial: Admission of evidence.

1. In an action to set aside certain taxes levied on plaintiff's lands, it appeared, among other things, that in a former action between the same parties and involving, in part, the same lands, the court found that such lands constituted portions of the right of way, depot grounds, railroad and terminal yards belonging to the plaintiff; that the lands, with the tracks, depots, and terminal yards thereon, constituted an entirety essential to the prosecution by plaintiff of its business; that said land and property could not be divided and sold in parcels without working irreparable injury to the plaintiff, and concluded as matter of law that each tract was exempt from taxation. It further appeared that in a second case in the same court, after finding that the lands involved were the same lands as in the former action, the court recited that the question at issue in the former action was whether said lands were exempt from taxation under subd. 14, sec. 1038, Stats. 1898, and that it was therein determined that each and all of said tracts were exempt

under that statute. There was no mention in either finding of any errors in description, nor that the taxes were held void on that ground. *Held*, that so long as the facts as to the use of the parcels remained the same, the question as to their being exempt from taxation was settled between the parties and could not be reopened.

2. In such case, where, in reply to the court's question, defendant stated it had no proof to offer as to *a changed condition or difference* of use of *any parcel* included in the *complaint*, it was not error to sustain plaintiff's objection to the introduction of any evidence by defendant.

3. In such case, the court was justified in assuming from such statement of defendant, that as to an additional parcel, not included in the former action, it had no additional proof to offer.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action in equity to set aside certain real-estate taxes levied by the city of Racine in the year 1902. The parcels of land on which the taxes were levied were a number of irregularly shaped tracts of land adjoining the tracks and switchyards of the plaintiff in the city of *Racine,* and the plaintiff claimed them to be exempt because necessarily used in the operation of the railway for its right of way, depot grounds and terminal yards. The complaint not only claimed exemption from taxes on these grounds, but upon the ground that the city was estopped for the reason that in two previous actions theretofore brought in the circuit court of Racine county, and involving taxes attempted to be levied upon the same lands in the years 1899, 1900, and 1901, said lands were adjudged to be exempt, which judgments were unappealed from and unreversed. The answer denied that the lands in question were necessarily used as a part of the plaintiff's right of way, depot grounds, or yards, and also denied that the previous judgments adjudged that the lands in question, as assessed in 1902, were exempt. Upon the trial the plaintiff introduced evidence generally in support of the allegations of the complaint, and introduced also the records of

the previous judgments, and objected to the introduction of any evidence by the defendants, on the ground that said previous judgments were conclusive, unless the defendants could show a change of use or situation of the lands. The defendants' attorney stating that he had no proof of changed condition or difference of use of any parcel named in the complaint, the objection was sustained. Findings were made to the effect that the lands in question were exempt, because they constituted a part of the right of way, depot grounds, and terminal yards of the plaintiff, and also constituted a part of the entirety; that they were occupied for the same purposes and in the same manner in the years 1899, 1900, and 1901, and that the previous judgments aforesaid conclusively estopped the defendants from further litigating the question of exemption so long as the use and occupation continued the same; that a certain additional parcel of land, described in the complaint in this action, which was not described in the previous actions, constitutes a part of the same general tract, and is occupied and used in the same manner. Upon these findings judgment was rendered for the plaintiff, setting aside the taxes, and the defendant city of *Racine* appeals.

M. E. Walker, for the appellant.

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney* and *W. D. Thompson.*

Winslow, J. The only question necessary to be considered in the present case is as to the conclusiveness of the former judgments. It is admitted that the lands involved in the present action are covered by the descriptions of lands involved in the previous action, save as to one parcel, which will be separately considered. But it is said that in the first of the previous actions the descriptions did not except the strips occupied by the railroad tracks which crossed the various parcels, while in the second action the descriptions were

the same, with the words "except right of way" added, and that in both actions the taxes were set aside on the ground of defective description, and not upon the ground that the lands were exempt.

Examination of the findings in the former cases shows that the contention cannot be sustained. In the first case, after describing the various parcels of land, the court finds as matter of fact that said lands "constitute portions of the right of way, depot grounds, railroad and terminal yards belonging to the plaintiff corporation at the city of *Racine* and adjoining its tracks in said city," and "that the lands so described as aforesaid, with the tracks, depots, and terminal yards thereon, constitute an entirety essential to the prosecution by the plaintiff of its business at the city of *Racine,* and that said lands and property cannot be divided and sold in parcels without working irreparable injury to the plaintiffs," and concludes as matter of law that each of said tracts as assessed is "exempt from taxation by the statutes of the state of Wisconsin." In the second case the court, after finding that the lands involved are the same lands involved in the former litigation, recites that the question in issue in said former case was whether said lands were exempt under the terms of subd. 14, sec. 1038, Stats. 1898, and that it was determined in said action that each and all of said tracts were exempt from taxation under said statute. There is no mention in either finding of any errors in description, nor is it even hinted that the taxes were held void on that ground.

These former judgments being so clearly based upon the finding that the lands were exempt from taxation on account of their use, it is very apparent that the question was actually litigated and decided in those cases, and that so long as the facts as to the use of the parcels remain the same the question is settled between the parties and cannot be reopened. The defendants expressly stated, in reply to the court's question, that they had "no proof to offer as to a *changed condi-*

contract between defendant and the government. The complaint sets forth the agreements pertaining to this delivery of shoes between defendant and the government and between defendant and the Jones-Earl Shoe Company, wherein the quantity of shoes, the kinds and prices thereof, were specified; and that plaintiff's assignor, the Jones-Earl Shoe Company, has furnished and delivered most of the shoes as required for which defendant received pay under the contract, and that defendant had paid on account of such delivery to the Jones-Earl Shoe Company on this contract the sum of $14,200, and that there is due the plaintiff, after allowing defendant the items of freight advanced by it, the loss incurred by reason of the nondelivery of 2,157 pairs of shoes contracted for, and some other disbursements chargeable to plaintiff, the sum of $539.17, for the goods delivered by Jones-Earl Shoe Company and accepted by the defendant. It was expressly stipulated, as shown in the complaint, in reference to payment on these contracts, as follows:

"It is further agreed that first party shall pay for said shoes to said second party as soon as it shall receive pay for the same or any part thereof, . . . and will promptly pay said second party as soon as it shall receive any money on account of said contract."

Defendant demurred to the two causes of action upon the ground that it appears upon the face of such alleged causes of action that they do not state facts sufficient to constitute causes of action. The court overruled the demurrer, and this is an appeal from the order.

For the appellant there were briefs by *Kronshage & McGovern,* and oral argument by *Theo. Kronshage.*

For the respondent there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *J. B. Simmons.*

Siebecker, J. The demurrer to the two causes of action alleged in the complaint calls for an interpretation of the contracts upon which plaintiff relies for a recovery. The defend-

ant insists that plaintiff is precluded from enforcing payment for any of the goods delivered under the contracts, because its assignor omitted to perform its part of the contracts by failing to manufacture and deliver all the shoes called for in the agreements. This claim is made on the ground that the agreements clearly show and express the intention that nothing should become due under the contracts for a delivery of any portion of the goods; in other words, it is asserted that the parties contemplated full performance in furnishing the goods called for as a condition precedent to recovery on the contracts. The contracts, however, provide for the payment of the goods delivered under them. It is stipulated that the defendant should pay for shoes furnished by plaintiff's assignor as soon as it should receive pay for the same, or any part thereof, and that it would promptly pay as soon as it should receive any money on account of the contracts. The terms of this stipulation are plain, and clearly indicate that payment should be made immediately upon the delivery and acceptance of any part of the goods, and *as soon as defendant received any money on account thereof from the government.* This manifestly excludes the idea that a delivery of all the goods was a condition precedent to recovery for any portion of the goods delivered and accepted under the contract. The parties seem to have so understood the agreements.

It is alleged that defendant made payment on goods delivered. Though the complaint does not show that these payments were apportioned to the quantity of goods delivered or money received from the government on account thereof, presumably they were made as contemplated by the stipulations, which required defendant to pay for them, or any part, promptly upon receipt of any money on account thereof. It is evident that they understood payments were to be made in instalments as delivery progressed. Under such terms of the agreement the failure to deliver a part of the goods does not absolve defendant from liability for the goods delivered, and

pleaded, evidence of plaintiff's general reputation as a quarrelsome and pugnacious person is admissible.

7. In an action for assault and battery, an instruction: "In assessing damages you may take into consideration the question of whether or not the plaintiff is of a quarrelsome disposition, whether or not he has heretofore been engaged in quarrels and fights, as bearing upon the question of how much, if any, plaintiff was humiliated and injured in his feelings by the assault alleged in this action. This you may do, not by way of reducing actual damages, but in ascertaining actual damages," is erroneous and prejudicial in so far as it submitted the question of former particular instances of plaintiff's misconduct in violating law as competent evidence in the case.

8. In an action for assault and battery, where self-defense is pleaded, proof of plaintiff's quarrelsome character may be considered by the jury, with other relevant testimony, in determining what compensation he is entitled to recover for injuries to his feelings.

9. In an action for assault and battery, where the facts and circumstances were such that the jury might reasonably have drawn the inference that defendant acted maliciously and wantonly in assaulting the plaintiff, it is error to instruct the jury on the subject of punitory damages, in substance, that, since the altercation arose out of a business transaction, which led defendant to beat plaintiff, it refuted all inference of malicious or wanton conduct.

10. In actions for assault and battery, it is not necessary that the defendant be imbued with malice for any length of time before the assault to subject him to exemplary damages; it is sufficient that malice prompted the assault, though it existed but for a moment before the blow was struck.

11. In an action for assault and battery, where the evidence as to the injuries conflicted in many material and important respects, it is not error for the trial court to refuse to grant a new trial upon the ground that the compensatory damages awarded are wholly inadequate to the injuries proven.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to recover damages for injuries for an assault and battery. Plaintiff charges that he was assaulted and beaten by the defendant on August 11, 1899, by being violently struck in the face, seriously bruising it, and breaking his nose,

which injuries caused him much pain, loss of time in attending to his affairs, and made it necessary to incur expenses for medical attendance. Defendant denies the charge so alleged in the complaint, and avers that he was led into the altercation by plaintiff's refusal to pay him the price of a cow purchased by plaintiff from defendant's agent, and that he slapped plaintiff in defending himself from a threatened assault. It appeared upon the trial that plaintiff had purchased a cow from defendant's agent, for which defendant demanded payment at the time of the affray. Upon such demand by defendant, plaintiff insisted that defendant was indebted to him on account of rent. This defendant denied, and pressed for immediate payment for the cow. The statements of the parties as to what occurred between them after this stage of the transactions are wholly at variance; plaintiff claiming that defendant, without cause or provocation, then violently beat him, while defendant charges that he was threatened and assaulted by plaintiff, and was compelled to defend himself against an imminent and dangerous assault which was liable to cause him bodily injury. The case was tried before the court and jury, resulting in a verdict for plaintiff awarding him compensatory damages at the sum of $55. Judgment was awarded in his favor accordingly, and from such judgment this appeal is taken.

For the appellant there was a brief by *L. M. Sturdevant* and *Chas. F. Grow,* and oral argument by *Mr. Sturdevant.* They contended, *inter alia,* that ordinarily evidence as to the character of defendant, his general reputation or the like, being irresponsive to the issue, is inadmissible in mitigation or augmentation of damages. *Vance v. Richardson,* 110 Cal. 414; *Anthony v. Grand,* 101 Cal. 235; *Thompson v. Church,* 1 Root (Conn.), 312; *Cummins v. Crawford,* 88 Ill. 312; *Elliott v. Russell,* 92 Ind. 526; *Reddin v. Gates,* 52 Iowa, 210; *Reed v. Kelly,* 4 Bibb (Ky.), 400; *Soule v. Bruce,* 67 Me. 584; *Day v. Ross,* 154 Mass. 13; *Sowell v. McDon-*

ald, 58 Miss. 251; *Lyddon v. Dose,* 81 Mo. App. 64; *Barr v. Post,* 56 Neb. 698; *Pulver v. Harris,* 61 Barb. 78; *Smithwick v. Ward,* 7 Jones (N. C.), 64, 75 Am. Dec. 453; *Porter v. Seiler,* 23 Pa. St. 424. Defendant may not, to reduce or mitigate the damages, attack the character of the plaintiff, or show his reputation for turbulence, or his propensity to commit or provoke breaches of the peace. *Dimick v. Downs,* 82 Ill. 570; *Gardner v. Cross,* 6 Rob. (La.) 454; *McCarty v. Leary,* 118 Mass. 509; *Hall v. Power,* 12 Met. 482; *Ellis v. Short,* 21 Pick. 142; *Corning v. Corning,* 6 N. Y. 97; *Shook v. Peters,* 59 Tex. 393. Neither plaintiff nor defendant can show that he is of good character or reputation. *Denton v. Ordway,* 108 Iowa, 487; *Givens v. Bradley,* 3 Bibb (Ky.), 192; *Smithwick v. Ward,* 7 Jones (N. C.), 64, 75 Am. Dec. 453; *Sayen v. Ryan,* 9 Ohio Cir. Ct. 631; *McKinzie v. Allen,* 3 Strobh. Law, 546. In a civil action for assault and battery, evidence of the general reputation of the defendant for peace and quietness is not admissible. *Pokriefka v. Mackurat,* 91 Mich. 399; *Zube v. Weber,* 67 Mich. 52; *Vance v. Richardson,* 110 Cal. 414, 42 Pac. 909; *Fahey v. Crotty,* 63 Mich. 383; *Darwin v. Parsons,* 52 Mich. 425.

S. M. Marsh, for the respondent.

SIEBECKER, J. Several errors are assigned upon the admission of testimony over plaintiff's objection.

(a) Upon cross-examination, plaintiff was asked if defendant had not paid in full and settled for rent for periods subsequent to the time of the claim which he sought to offset against the amount due for the cow. The court directed that the inquiry be answered, over objections. This claim for rent was the subject of contention between the parties immediately before they came to blows, and plaintiff testified concerning it on direct examination. This cross-examination of the plaintiff was proper to inform the jury whether his claim was made merely to annoy and provoke defendant, or was an at-

tempt to collect a demand which he in good faith believed was due him.

(b) Plaintiff was also compelled to answer the inquiry, over objection, whether he was prompted to institute this action because the defendant compelled him to pay for the cow. While plaintiff's motive in bringing the suit can in no way affect his cause of action, the inquiry must have been calculated to show his bias and prejudice, and thus discredit him as a witness. We do not perceive that there was an abuse of the right of cross-examination. Had he answered in the affirmative, it would have been proper for the jury to consider this fact in determining the weight of his testimony and the degree of credibility to be attached to his evidence.

(c) The next exception argued pertains to the admission of evidence showing that plaintiff had committed particular assaults and batteries at times preceding the one in question. The plaintiff and several witnesses were examined on this subject, and their testimony showed that he was guilty of such offenses at different times, covering a period of from four to seventeen years prior to the time of this affray. Defendant seeks to justify the introduction of this evidence upon the ground that it might tend to show that the injuries complained of had been received in such former assaults, and that it would show that plaintiff was in the habit of employing a physician only in those cases in which he intended to claim and sue for damages for personal injuries. There is nothing in the evidence to warrant the inquiry upon these grounds. The injuries described by the plaintiff, and for which compensation was asked, were all of recent origin. His employment of physicians on former occasions can have no relevancy as showing the necessity of employing one to attend him for the injuries which he claimed to have suffered on this occasion. The evidence was not competent for these purposes.

It is argued, however, that the evidence was competent and material to show plaintiff's character as being of a quarrel-

some and pugnacious disposition. This class of testimony has, save in exceptional cases hereinafter referred to, not been admitted to show the character of a party, even where character is material to the controversy. Proof of particular instances of misconduct of a party, as evidence of character, is deemed repugnant to the best administration of justice, and is therefore admitted only upon cross-examination for the purpose of discrediting witnesses and in cases to recover damages for an indecent assault upon a female. In the last class of cases, evidence of particular instances of unchaste conduct is admitted to show character in this and some other jurisdictions. In the case of *Watry v. Ferber,* 18 Wis. 502, 525, the court declares:

"But whatever may be the true rule in regard to the admission of such testimony in criminal prosecutions, it appears to us in a civil action of trespass, when the plaintiff has alleged as a matter of aggravation that the defendant had connection with her against her will, the defendant should be permitted to show that the plaintiff has been previously criminal with other persons, as a circumstance tending to disprove the probability of the use of force." *People v. Shea,* 125 Cal. 151, 57 Pac. 885; *State v. Patterson,* 88 Mo. 91.

In other civil actions for the recovery of damages such evidence is held incompetent in all jurisdictions. The grounds upon which such evidence is excluded are that it would tend to a confusion of issues, waste of time, and "because of the unfair surprise to the witness, who cannot know what variety of false charges may be specified, and cannot be prepared to expose their falsity." This rule is well established, and accepted by the courts. *Muetze v. Tueteur,* 77 Wis. 236, 46 N. W. 123; Greenleaf, Evidence (16th ed.) § 461. It was prejudicial error to admit this proof over plaintiff's objection.

In view of the issues raised by the pleadings, it was proper to receive evidence of plaintiff's general reputation as a quarrelsome and pugnacious person. Defendant avers that he struck plaintiff in self-defense, and alleges that he knew

plaintiff was disposed to assault others without provocation or justification, and believed, in view of plaintiff's conduct and violent disposition, he was in peril of being violently assaulted when he struck him. Under this allegation, proof of plaintiff's disposition in the respect mentioned has been deemed relevant and material by this court, and we do not feel disposed to disturb the practice. *Keep v. Quallman,* 68 Wis. 451, 32 N. W. 233. See, also, *Culley v. Walkeen,* 80 Mich. 443, 45 N. W. 368.

The court instructed the jury:

"In assessing damages you may take into consideration the question of whether or not the plaintiff is of a quarrelsome disposition, whether or not he has heretofore been engaged in quarrels and fights, as bearing upon the question of how much, if any, plaintiff was humiliated and injured in his feelings by the assault alleged in this action. . . . This you may do, not by way of reducing actual damages, but in ascertaining actual damages."

This instruction is excepted to, and made the basis of complaint, because it permits the jury to take the evidence of plaintiff's reputation into consideration in estimating his damages. In so far as the instruction submitted the question of former particular instances of plaintiff's misconduct in violating the law as competent evidence in the case, the instruction was erroneous, for the reasons above stated, and was well calculated to prejudice plaintiff in his rights.

It is the general rule that evidence of a party's character is not admissible in civil actions for damages unless his character is directly in issue—as in slander, seduction, and other cases—"even though the cause is one for which a criminal prosecution may be brought, or where the offense set up in justification involves a crime." *Geary v. Stevenson,* 169 Mass. 23, 47 N. E. 508, and cases cited; *Fahey v. Crotty,* 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305; *Cummins v. Crawford,* 88 Ill. 312, 30 Am. Rep. 558; Greenleaf, Evi-

dence, § 14*b*, subd. 4. This general rule does not go to the extent of excluding such evidence for all purposes. As stated in *Keep v. Quallman,* plaintiff's general reputation as a man of quarrelsome and violent disposition, if within the knowledge of a defendant before an affray, is competent evidence to go to the jury upon the issue of self-defense. *Culley v. Walkeen,* 80 Mich. 443, 45 N. W. 368; *Galbraith v. Fleming,* 60 Mich. 403, 27 N. W. 581. The court ruled in this case that an issue of self-defense was raised by the pleadings, and submitted it to the jury upon the evidence. But, since a new trial must be ordered, it will be best to ascertain if this proof pertaining to plaintiff's general reputation is material and competent to aid the jury in ascertaining the compensatory damages. Plaintiff asked for full compensatory damages, which includes the element of compensation for injury to his feelings resulting from the sense of humiliation and disgrace to which he had been subjected by this affray. In awarding him remuneration for the injury, the jury were required to measure the extent of his suffering in this respect by ascertaining to what degree the affair affected his moral sensibilities and caused him anguish of mind. In solving this question, plaintiff's disposition would have a bearing as showing what suffering, if any, he had endured, resulting from his sense of humiliation and disgrace. As above stated, parties to civil actions for damages are not permitted to go into the question of the complainant's character for the purpose of showing his damages, except it be directly in issue. This evidence, however, is not excluded because it is irrelevant to the inquiry, but because a trial of character for that purpose would be an unfair surprise to the plaintiff, and would prejudice the jury, and would result in an undue waste of time. Since proof of plaintiff's exceptional character was provable and competent under the issue of self-defense, there is no reason why such proof may not be considered by the jury, with

other relevant testimony, in determining what compensation he is entitled to recover for injury to his feelings.

Another exception urged to the charge is that the court erred in giving the following instruction on the subject of punitory damages:

"If, for instance, the plaintiff and defendant met, and there was provocation in what occurred between them growing out of a dispute about a business matter at the time, and the defendant, moved by a sudden impulse, turned and struck the plaintiff, and that is all that happened, then you would not be justified in punishing the defendant by what are called exemplary damages. That would be the ordinary case of business men getting into a dispute over a business matter, and one of them becoming angry, and on the impulse of the moment striking the other. So, if you find that was the situation here—that the defendant, without previous malice, and not wantonly, became angry over a business transaction, having provocation as reasonably appeared to him, and on the impulse of the moment he struck the plaintiff—then I say to you, gentlemen, that you would not be justified in assessing any exemplary damages."

We think this instruction was clearly erroneous. The facts and circumstances covered by the instruction, under which the jury were directed to allow no punitory damages, were such from which the jury might reasonably have drawn the inference that the defendant acted maliciously and wantonly in assaulting the plaintiff. The jury were, in effect, directed that, since this altercation arose out of a business transaction, which led defendant to beat plaintiff, it refuted all inferences of malicious or wanton conduct. The instruction seems to have been framed in the idea that under no reasonable inference from the evidence could it be said that defendant acted maliciously and wantonly in striking the plaintiff, unless it appeared that he harbored malice against him before the altercation resulting in the affray. It was not necessary that defendant be imbued with malice for any

length of time before the assault to subject him to punishment by way of enhancing the damages. If malice prompted the assault, though it existed but for a moment before the blow was struck, then exemplary damages may be awarded. The instruction failed to give the jury the correct rule on the subject, and may have been prejudicial to plaintiff's rights. The fact that no punitory damages were awarded may have resulted from the erroneous instruction.

It is insisted that the court should have granted a new trial upon the ground that the compensatory damages awarded are wholly inadequate for the injuries proven to have been sustained. The evidence as to the injuries conflicts in many material and important respects. The case is of such a nature, and the facts and circumstances are such, that varying conclusions may reasonably be reached, depending largely upon what the jury found actually took place at the time of the affray, and in what respect and to what extent plaintiff suffered. We cannot say that the jury acted perversely in fixing the amount of the compensation.

Other questions discussed by counsel are not likely to arise upon another trial, and therefore need not be considered.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SMEESTERS, Appellant, vs. SCHROEDER, Respondent.

October 18—November 15, 1904.

Sales: Breach of warranty: Rescission: Actions: Election of remedies.

Plaintiff brought his action to recover damages for difference in value of a warranted horse received in trade for a horse of plaintiff's. It appeared, among other things, that, before commencing the present action, plaintiff attempted to institute replevin proceedings, and thereafter, with full knowledge of

every fact, including the sale by defendant of the horse received from plaintiff, insisted that his horse be returned to him, tendered back, in the most conclusive manner, the horse received from defendant, refused to exercise any further acts of ownership over it, and left the same subject to defendant's control. *Held*, that plaintiff was shown to have exercised an election in favor of a rescission of the sale, and therefore could not maintain the present action.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action to recover damages for difference in value of a warranted horse received in trade for a horse of the plaintiff's; the plaintiff claiming, also, $25 special damages for expenses in transporting and caring for such horse. The jury, by special verdict, found a warranty and a breach thereof, and $65 as the difference in value between the horse in fact and as warranted. It appeared without dispute that upon discovering the breach of warranty the plaintiff, on July 9, 1902, went to defendant and demanded rescission and return of the horse given by plaintiff, saying that defendant's horse would arrive for surrender the following day; that demand was refused. Thereupon, on same day, plaintiff made affidavit before a justice of the peace, and obtained a warrant of replevin for the horse given by him, which warrant he delivered to the sheriff, who, however, was unable to find and take the property, and therefore made no service of the warrant, which never was returned; the proceedings being dismissed on the justice's docket two or three days later, and all before the commencement of this action. On July 10th plaintiff again demanded return of his horse; notified defendant that the other was in town and ready for delivery, and would be left at a certain livery stable subject to his order. The defendant again refused rescission, and informed plaintiff that the horse he had traded had been sold to a third person. Whereupon plaintiff left the horse he had received at a livery stable, with orders to deliver to defendant,

and has had no contact with it since. The court ruled that these steps taken by the plaintiff constituted an election of remedies with which the present action was inconsistent, and therefore ordered judgment dismissing the complaint, after having first overruled a motion for a new trial, from which judgment plaintiff appeals.

For the appellant there were briefs by *Sheridan & Evans,* and oral argument by *P. Sheridan.*

For the respondent the cause was submitted on the brief of *McGillan & Fontaine.*

DODGE, J. The plaintiff, having been induced to trade horses by misrepresentation or false warranty as to the quality of the horse he was receiving, under familiar rules, had right of election either to stand upon the contract which the defendant had induced, and to recover the damages resulting to him by reason of the defective quality of the horse which he had received, or to rescind the contract, and, upon returning what he had received, to recover back that with which he had parted, or its value if not recoverable in specie. *Fairfield v. Madison Mfg. Co.* 38 Wis. 346; *Park v. Richardson & B. Co.* 81 Wis. 399, 51 N. W. 572. It is, of course, apparent, as stated in the cases above cited, that the remedies above described are wholly inconsistent. Either there is a contract, for breach of which plaintiff is entitled to recover damages, or the contract is set aside and goes out of existence, whereby he becomes entitled to a return of that with which he parted on the faith of the contract. The existence of one situation negatives the other.

The exercise of such election is, of course, mental—provable only by some overt act; hence the law has become established that, when a party vested with such election does some decisive act evincing his choice, he has then adopted that position finally, and cannot recede from it, with some exceptions in the presence of mistake or ignorance of material facts.

Boothby v. Scales, 27 Wis. 636; *Boynton F. Co. v. Sorensen,* 80 Wis. 594, 50 N. W. 773; *Crook v. First Nat. Bank;* 83 Wis. 31, 52 N. W. 1131; *Hildebrand v. Tarbell,* 97 Wis. 446, 456, 73 N. W. 53; *Carroll v. Fethers,* 102 Wis. 437, 78 N. W. 604; *Terry v. Munger,* 121 N. Y. 161, 24 N. E. 272; *Robb v. Vos,* 155 U. S. 13, 15 Sup. Ct. 4. It has often been held that, whatever other facts may be decisive, the actual commencement of a suit predicated on either theory is plenary and complete proof of the exercise of plaintiff's election. *Carroll v. Fethers, supra; Clausen v. Head,* 110 Wis. 405, 85 N. W. 1028. The rule is invoked here, and claimed to have been satisfied by the mere taking out of the warrant of replevin; and much of the argument on both sides is addressed to the sufficiency of this act alone, and also to the question whether it is shown to have been done so in ignorance or mistake of material facts that it ought not to conclude plaintiff. We shall not deem it necessary to decide either of these propositions, for the election may as well be evinced and declared by other acts decisive and unambiguous in their character. Here, apart from the mere suing out of the warrant of replevin, it is established that the plaintiff, at a time when he had full knowledge of every fact, including the sale by defendant of the horse received from plaintiff, reiterated his demand for action consistent only with rescission of the contract; insisting that his horse be returned to him, and tendering back, in the most conclusive manner, the horse he had received from the defendant, refusing to exercise any further acts of ownership over it, and leaving the same subject to the control of the defendant. This, as supplementary to the act of at least attempting to institute replevin proceedings, leaves no possible doubt that plaintiff had elected that the contract should be set aside, and that the rights of the parties should be such as resulted from that situation. His action now in seeking the damages claimed in this suit is consistent only with the continued existence of that contract. The court was

clearly right in holding that the plaintiff was shown to have exercised an election in favor of the former situation, and must seek his remedies accordingly, and cannot maintain this action.

By the Court.—Judgment affirmed.

CURRIE and another, Respondents, vs. MICHIE, Executrix, Appellant.

October 18—November 15, 1904.

Estates of decedents: Claims: Trial by court: Findings: Evidence: Fraud: Duress: Compounding felony: Appeal and error: Witnesses: Transactions with person since deceased: Husband and wife: Material error.

1. In an action on a claim filed against a decedent's estate the evidence, stated in the opinion, is *held* to fail to establish fraud or duress, or that consideration for the claim was the compounding of a felony.
2. In an action tried by the court, the improper admission of evidence is not available as error on appeal.
3. In such case, it is sufficient that evidence properly admitted supports the findings.
4. Where a party is called under sec. 4068, Stats. 1898, as an adverse witness and examined as to transactions and communications had with a person since deceased, in respect to such matters, the examination opens the door to the admission of the testimony of the adverse party.
5. Where a married woman is a party in the capacity of an executrix, it is not error to exclude the testimony of her husband, who was offered as a witness generally in the case and not as her agent.
6. In an action tried by the court, it is not material error to refuse to strike out testimony that is without probative force, or to sustain objection to a question calling for nothing material to the issues in the case.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

It appears from the record that William S. Fraser died testate July 22, 1899; that his will was admitted to probate, and his daughter, *Isabelle Michie,* was duly appointed as executrix of the will; that October 31, 1899, the firm of Currie Bros. presented a claim against the estate for $1,000, with interest at seven per cent. from May 1, 1894—the same being the balance due on a note of $1,774.75 executed by the deceased August 28, 1893, and upon which had been paid by the deceased $858.61, leaving the balance mentioned. The executrix objected to such claim on the ground that it was given without consideration, and that said deceased was induced to sign said note by fraud and duress, and threats of Currie Bros. that unless he gave the same they would prosecute his son, James A., for embezzling upwards of $4,000 while he was in their employ. The executrix also answered by way of counterclaim to the effect that at the time of giving said note the said deceased was induced by fraud, duress, and such threats of prosecution to surrender to Currie Bros. a duebill executed by them August 31, 1887, and for which she claimed $2,225.25, and also the $858.61, so paid on the note of $1,774.75. Currie Bros., by way of reply, put in issue the allegations of the counterclaim. The county court allowed such claim of Currie Bros., and on appeal to the circuit court the cause was tried therein *de novo,* and at the close of the trial the court found, in addition to the facts stated, as matters of fact, in effect: (1) That prior to February 3, 1893, James A. Fraser became indebted to Currie Bros. in a sum exceeding $4,000 of their moneys taken by him while in their employ without their knowledge or consent. That upon the discovery of such embezzlement by Currie Bros. on the day and year last named, and confronting James A. Fraser with the fact, he admitted the same, and

proposed to pay what he could realize upon the sale of certain lots, and secure the balance, and for the purpose of securing the same he obtained from his father and delivered to Currie Bros. Exhibit 2, which reads:

"Milwaukee, February 10th, 1893.

"I hereby stand security to the amount of $4,000.00 for James A. Fraser to the firm of Currie Brothers pending examination of their books, the said examination to be completed as soon as possible.

"[Signed] WILLIAM S. FRASER."

There is written across the face of this instrument: "Returned and canceled August 28th, 1893, as per agreement of that date." And that, in procuring the same, Currie Bros. had no communication with the deceased relating to such claim against James A. Fraser, and made no threat of prosecution to him or to James A., and James A. in no manner led his father to believe that he was liable to be prosecuted for such embezzlement, and that the deceased executed Exhibit 2 freely and voluntarily as such security. (2) At the time of giving Exhibit 2, Currie Bros. were indebted to the deceased on the duebill mentioned, signed by them August 31, 1887, for $2,150 with interest at seven per cent., no part of which had been paid, except a portion of the interest. (3) August 28, 1893, there was due to the deceased from Currie Bros. on that duebill, for principal and interest, $2,225.25, and that upon the last-named day and year Currie Bros. and the deceased met, and settled and agreed upon $4,000 as the amount which, pursuant to Exhibit 2, the deceased should pay to Currie Bros. That, as a part of such payment, the deceased was to surrender to Currie Bros. the duebill, and that the amount then due thereon of $2,225.25 should be deducted from the $4,000, leaving a balance for which the deceased then and there gave his note of $1,774.75 to Currie Bros., payable May 1, 1894, and that such settlement was the free and voluntary act of the deceased without

any fraud, duress, or compulsion. (4) May 9, 1894, the deceased freely and voluntarily, and without fraud, compulsion, or duress, and without any threat or promise, paid to Currie Bros. upon said note $858.61, leaving the balance of $1,000 so filed as a claim against the estate of the deceased. (5) No other payment has ever been made upon said note, and there is due thereon $1,000, with interest at seven per cent. from May 1, 1894. (6 and 7) The allegations in the answer to the effect that the note was given by the deceased without consideration and by fraud and duress are not proven, and are not true. (8) The allegations of the counterclaim are not proven, and are not true.

As conclusions of law the court found, in effect, that Currie Bros. are entitled to judgment against the estate of the deceased for $1,000, with interest thereon at seven per cent. from May 1, 1894, and their costs and disbursements in this action, and also judgment dismissing the counterclaim alleged in the answer, and ordered judgment accordingly. From the judgment so entered, the executrix brings this appeal.

John S. Maxwell and *Joseph B. Doe,* for the appellant.

For the respondents there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

CASSODAY, C. J. It is undisputed that James A. Fraser was in the employ of Currie Bros. February 3, 1893, and had been for some years. On or about that date Currie Bros. discovered that James A. had for some time been appropriating their money to his use, without their knowledge or consent, to the extent of $4,000 and upwards. When confronted with the fact of such discovery, James A. admitted that he had so converted the moneys of the firm to his own use to the extent mentioned. James A. was at the time about thirty-three years of age, and his father was about seventy-seven years of age. He was told by Currie Bros. that they wanted their

money back or security, and they finally agreed that, if James A. would give them security for $4,000, it would be satisfactory. James A. thereupon went to his father and told him the circumstances, whereupon his father told James A. to write out a paper, and he would sign it; and he then wrote Exhibit 2, dated February 10, 1893, set forth in the statement of facts, and called the "guaranty," and his father then signed it, and James A. delivered it to Currie Bros. the next day, or within a day or two, as stated in the findings. There is no claim nor pretense that the deceased did not sign that guaranty freely and voluntarily, and without any fraud, duress, or threat of prosecuting James A. by Currie Bros. The same is true as to the $4,000 note which the evidence on the part of the plaintiffs tends to prove was about the same time drawn up by James A. at the house of his father, and then signed or indorsed by himself and his father, and then by him delivered to Currie Bros., and by them subsequently lost. The defendant denied the existence of any such note, and the findings fail to determine the question, but its determination does not seem to be very material.

The important question upon which the case must turn is whether the settlement of August 28, 1893, was valid and binding upon the deceased. There is certainly strong evidence tending to prove that the deceased was induced to make that settlement to prevent Currie Bros. from instituting criminal proceedings against James A. on account of such embezzlement. Such evidence is to the effect that about a month prior to the settlement *James Currie* called at the house of the deceased, and went upstairs and into his bedroom, and remained there with the deceased about an hour, with the door closed, and during the time talked in a loud and excited manner about James A. and security, which was heard by those outside, and that when *James Currie* left the bedroom he came down stairs alone, and passed out without speaking to any one. After the discovery of the embezzlement, Mr. Moses

H. Brand, an attorney at law, was employed by the deceased to investigate the matter; and he testified to the effect that a short time before the settlement he was told by Currie Bros. that, if they could not get their money back, they would insist upon having criminal action against James A.; that the parties met at his office pursuant to agreement to make such settlement August 28, 1893; that at that time *James Currie* and the deceased, after some talk, arranged that the deceased should surrender to Currie Bros. the duebill he held against them, of $2,150, which, with the interest, then amounted to $2,225.25, and give to Currie Bros. his note for the balance of the $4,000, which amounted to $1,774.75; that he then drew the note which was signed by the deceased, and at the request of the deceased he drew the contract or receipt, to the effect stated, and also stated:

"In consideration of the above payment it is understood and agreed that criminal proceedings will not be instituted by us against said James Fraser for the above or any other amounts of money taken by him or for any other sum of money which may have been taken by him."

That he then added at the suggestion of *Mr. Currie* a proviso to the effect that, if they should thereafter discover that James A. had wrongfully taken from them any sum in excess of the $4,000, then he was to give them his note therefor, and, if he should refuse, then nothing therein should prevent them from taking criminal action against him; and that the language of the paper was his own. Such agreement bears date August 28, 1893, and is signed, "Currie Brothers per *James.*" After a good deal of hesitancy, *Mr. Currie* virtually admits that his signature to the paper is genuine, but claims that he signed it without knowing its contents, and denies that there was any understanding that they were to refrain from prosecuting James A. The court refused to find whether such written agreement was in fact made. It is difficult to believe that *Mr. Currie* did not know the contents of

the paper when he signed it, and yet there is no evidence that he read it or that it was read to him before he signed it, nor that the agreement not to prosecute, contained in the writing, was made in pursuance of any parol agreement or understanding between the deceased and Mr. Currie. Mr. Brand testified that it was impossible for him to give the details of the conversation between *Mr. Currie,* Mr. Fraser, and himself on that occasion. Of course, it was possible for *Mr. Currie* to believe that the paper he signed was a mere memorandum of the surrender of the one note and the giving of the other. Mr. Brand was a lawyer, and necessarily knew that no valid contract or agreement to compound a felony could be made. The deceased executed his will July 31, 1894, about eleven months after the settlement in question, and nearly three months after he had paid $857.86 on the note of $1,774.75. Mr. Brand was a subscribing witness to the will, and presumably wrote it, since he was the attorney and counsel for the deceased. And yet that will contained this clause:

"Having advanced to or paid for my son James Fraser large sums of money I purposely and intentionally omit making any devise or bequest to him and do intend and desire that he shall not receive any part or portion of my estate."

This manifestly refers to the $2,225.25 and the $857.86 so paid by the deceased for the benefit of his son James A. *Mr. James Currie* is corroborated in some particulars by other witnesses—especially by James A. Fraser. The transaction took place nearly ten years before the trial. The county court and the circuit court saw and heard all the witnesses, and hence those courts were each in a much better position to judge of the credibility of the witnesses than this court. The claim of Currie Bros. against the estate of the deceased was allowed in both courts. In view of all the circumstances, we cannot say that the findings of the trial court are against the clear preponderance of the evidence. In reach-

ing this conclusion, we have confined ourselves to the competent evidence in the record.

Several errors are assigned for the improper admission of evidence, and for the refusal to strike out testimony. The rule is well established that in a case tried by the court, as here, the improper admission of evidence is not available as error upon appeal. *Wolf v. Theresa Village M. F. Ins. Co.* 115 Wis. 402, 405, 91 N. W. 1014, and cases there cited. If the evidence properly admitted supports the findings, it is sufficient. Id.

Error is assigned because the court permitted *James Currie* to testify to transactions and conversations with the deceased when no one else was present, and for refusing to strike out such testimony. But it appears from the record that the defendant first called and examined him, under sec. 4068, Stats. 1898, as an adverse witness, and on such examination he had testified to the effect that he saw the deceased in regard to the embezzlement a few days prior to August 28, 1893, at his own house, and also at the house of the deceased, when they arranged to meet at Brand's office, and that they met pursuant to that agreement, and that the purpose of the meeting was to adjust this embezzlement matter—to make a settlement which was afterwards made—and he was further asked and answered the question whether he ever promised the deceased that he would not prosecute his son. By such examination the defense opened the door, under sec. 4069, Id., for the admission of the testimony to which objection is now made.

There was no error in excluding the testimony of the defendant's husband, who was offered as a witness generally in the case, and not as the agent of his wife.

The witness Campbell, after testifying at length as to his acquaintance and conversations with the deceased, and as to the trouble of the deceased with Currie Bros., and as to his

disposition, habits, and conduct, stated that on one occasion, after *Currie* had passed by on the street, the deceased said he did not speak to them at all, and thereupon the witness asked him as to what was the matter. Error is assigned because the court sustained an objection to the question, and refused to strike out such declarations of the deceased. We perceive no reversible error in such rulings. The testimony sought to be stricken out is all before the court, and is without probative force. The unanswered question called for nothing material to the issues in this case.

By the Court.—The judgment of the circuit court is affirmed.

HICKOX and another, Respondents, vs. SEEGNER, Appellant.

October 18—November 15, 1904.

Landlord and tenant: Lease: Construction: Sale of premises: Termination: Removal of tenant.

A lease for a term of five years provided that it should "expire after three years (from its date) if the leased property is sold." More than three years after the date of the lease the property was sold. *Held*, that the lease at once expired on the sale, and the grantee under such sale could maintain proceedings to remove the tenant.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is a proceeding to remove a tenant, under ch. 145, Stats. 1898. The case was tried before a jury, and the evidence showed without dispute that September 16, 1899, one Anna Kleinhans, then being owner of a store building in the city of Milwaukee, leased the same by written lease to the defendant for a term of five years from October 15, 1899, the lease containing this provision:

"This lease will expire after three years from October 15, 1899, if the leased property is sold."

It further appears that the defendant went into possession of the premises, and is still in the possession of the same, and that on January 26, 1893, Anna Kleinhans sold and conveyed the same and assigned the lease aforesaid to one Odenbrett, who transferred both the premises and the lease to the Farwell Investment Company on the same day, which company transferred both the property and the lease to the plaintiffs on the 28th of February following; that due notice terminating said lease was given prior to the commencement of this action. Defendant refuses to vacate the premises, claiming that the lease had not been terminated at the time of the commencement of this action. The following special verdict was rendered:

"(1) By the use of the following words, to wit, 'This lease will expire after three years from October 15, 1899, if the leased property is sold,' did the parties to the lease mean and intend that the lease should expire three years from October 15, 1899, if in the meantime the property should be sold, and if not sold during said time the lease should not expire before the end of five years? A. Yes. (2) If you answer the first question 'No,' then by the use of the following words, to wit, 'This lease will expire after three years from October 15, 1899, if the leased property is sold,' did the parties to the lease mean and intend that, if the premises should be sold at any time after three years from October 15, 1899, the lease should thereupon expire, but if sold before October 15, 1902, it should not expire before said last-mentioned date? A. No."

After the rendition of the verdict the plaintiffs moved for judgment, and, if that motion were denied, they further moved that the verdict be set aside, and for a new trial. The court concluded that upon the undisputed facts the plaintiffs were entitled to recover possession, and rendered judgment for the plaintiffs, from which the defendant appeals.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *Charles E. Canright.*

C. T. Hickox, of counsel, for the respondents.

WINSLOW, J. The sole question in this case is as to the proper construction of the clause in the lease which runs thus:

"This lease will expire after three years from October 15, 1899, if the leased property is sold."

The plaintiffs argue that this clause means that, if the property is sold after three years from October 15, 1899, as in fact it was, the lease will at once expire. The defendant, on the other hand, claims that the clause means that, if the property is sold within the three-year period, then the lease will expire at the end of the period. We have no doubt of the correctness of the plaintiffs' construction. By that construction every word of the sentence is given its natural and usual meaning, and no words are added. The defendant's construction requires either the insertion of other words, or a change in the order of the words used, or both. In this situation, upon very familiar principles, the plaintiffs' construction must be adopted.

By the Court.—Judgment affirmed.

JOHNSTON, Respondent, vs. CHARLES ABRESCH COMPANY, Appellant.

October 19—November 15, 1904.

Insurance: Bailments: Adoption of insurance contract by bailor: Bailee's failure to collect insurance on bailor's property: Parol evidence: Trial: Pleading: Cause of action, contract or tort? Cross-examination.

1. Defendant, engaged in the business of manufacturing, buying, selling and repairing vehicles, received plaintiff's vehicle for repair, and thereafter to hold for the purpose of selling it for her. While so held a fire occurred injuring defendant's buildings, and damaging, among other property, plaintiff's vehicle. Defendant had insurance on its stock, consisting of vehicles

manufactured and in process of manufacture, and all materials and supplies used in or appertaining to its business, "either its own or held by it in trust or on commission, or in storage or for repair, or sold but not removed." On the day following the fire, plaintiff notified defendant that she would look to it for indemnity for her loss under the insurance so effected in its name, and also so informed the representatives of the insurance companies. Defendant denied all rights of the plaintiff to indemnity, and refused to include in its proofs of loss any damage to plaintiff's vehicle above the amount due for repairs, settled with the insurance companies on such basis, and released and surrendered its policies. *Held*, that the insurance policies were unambiguous and certain, covered plaintiff's vehicle, and were an insurance to indemnify her against loss or damage thereto.

2. It is lawful for a bailee or agent holding property for the purpose of repair, or of sale, to insure it against loss or damage by fire for the protection of his special interest and that of the owner. Such insurance may be taken in the name of the possessor, and, in case of loss, the avails are to be applied in satisfaction of his claim against the property, and, if there is an amount above such claim, he holds it for the owner.

3. In such case, while it is one of the requisites of the contract that it must appear therefrom that the owner was within the contemplation of the parties when the insurance contract was made, it is not necessary that the owner should be ascertained nor that the insurance fasten on specific property, nor the owner be known at the inception of the contract. If the owner, when informed, assents to and adopts the contract, he thereby becomes entitled to its advantages as fully as if originally made by his express authority.

4. In such case, although the owner was not a party to the policies at their inception, after loss and notice, parol evidence is inadmissible to show that the policies do not embody the agreements actually made.

5. Plaintiff left her vehicle with defendant for repair and then to hold for sale on plaintiff's account. Defendant, while so holding, took out insurance covering its own property and also that held by it in trust or for repair, and its property, including plaintiff's vehicle, was damaged by fire. Defendant failed to include the value of plaintiff's vehicle in its proofs of loss, and settled with the insurance companies for less than shown by such proofs. Plaintiff, on the day following the fire, notified defendant that she looked to it for indemnity, and also so informed the insurance companies. *Held*, that the amount paid by the insurance companies should be paid to plaintiff and

defendant in such proportion as the value of the property of each bore to the whole amount paid, except that the defendant had the right to indemnify itself in full, to the extent of its interest in or lien on plaintiff's property, out of the amount recovered for the loss.

6. In such case, a complaint setting forth the contractual relationship of the parties, defendant's fault in omitting to perform its obligation and consequent pecuniary injury to plaintiff, defendant's collection of the avails of the policies and retention as its own, expressly waiving the tort, if any, and declaring that plaintiff "sues herein on implied contract," sets forth a cause of action on contract, and not one sounding in tort.

7. Where plaintiff's witness on his direct examination has not testified on a given subject, and it does not appear that any defense on that subject is involved in the action, it is not error to sustain an objection to the cross-examination of the witness on that subject.

WINSLOW and DODGE, JJ., dissent.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Modified and affirmed.*

This is the same action considered on a former appeal (109 Wis. 182, 85 N. W. 348), where the facts are stated. After its return to the circuit court, plaintiff was allowed to amend the complaint by alleging that, by the terms of the policies of insurance and of the notice given by plaintiff after the loss, plaintiff adopted and sanctioned the contracts of insurance, and defendant was from that time bound to take such steps as might be necessary to collect from the several insurance companies her loss; that defendant refused and neglected to make proofs of her loss, or to take any steps to collect the same; that by such failure, and by accepting the sum of $13,094 and releasing the policies, defendant deprived the plaintiff of her rights and interests in the policies of insurance and the money payable thereunder, which it might have collected for her; and that, by reason of such transactions, defendant became responsible to plaintiff for such an amount of money as the plaintiff should have received, under the contracts and proof of loss, by reason of the damage to the vic-

toria, as part of the property covered by the policies. The amendment also expressly waived the tort, if any, of the defendant, and declared that plaintiff "sues herein on implied contract." The case was tried by the court, without a jury, upon the same testimony and evidence adduced upon the former trial. The court again found, as fact, that the value of the vehicle was $537; that the defendant settled with and surrendered the policies to the insurance companies, without including the damage to such vehicle in the proofs of loss; and that the plaintiff was entitled to recover such a sum in damages as she would have been entitled to receive, had the defendant included in its proofs and claims of loss the damage to said vehicle, which proportion was found to be $339.67. For this sum judgment was accordingly awarded in plaintiff's favor, and from such judgment defendant appeals.

For the appellant there was a brief by *Fiebing & Killilea,* and oral argument by *H. J. Killilea.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. H. Noyes.*

SIEBECKER, J. On the former appeal of this case it was held as to the cause of action that "the facts stated in the complaint show that this is an action for money had and received;" and the court determined, upon the pleadings and evidence then before it, that, "upon this basis, when the plaintiff proved that no claim for the value of the property was made to or adjusted by the insurance companies, her cause of action entirely failed, and the motion for a nonsuit ought to have been granted." It is manifest from the opinion that this was the only question considered and passed upon by the court. After the case was remanded the trial court allowed plaintiff to amend her complaint by striking out certain allegations, and by inserting and adding new matter. The amendments were objected to for the reason that they entirely changed the cause of action from one in contract to one

charging a tort. To determine the merit of this objection, it will be best to consider first the nature of the insurance contracts involved, and the rights and liabilities of the plaintiff, the defendant, and the insurance companies under them. The condition of the policies upon which plaintiff relies to sustain her claim prescribed that the amount of insurance on stock should attach "to stock consisting chiefly of carriages, buggies, wagons, cutters, sleighs and other vehicles and parts of the same, manufactured and in process of manufacture, and all materials and supplies used in or appertaining to its business, *either its own or held by it in trust or on commission, or in storage or for repairs, or sold but not removed.*" It is shown by the facts that the defendant was engaged in the business of manufacturing, buying, selling, and repairing various kinds of vehicles, and while so engaged, some time prior to April 13, 1898, received plaintiff's victoria for repairing it, and thereafter to hold it for the purpose of selling it for her. While it was so held, and while the insurance in question was in force, a fire occurred on this date in defendant's buildings, injuring them, and damaging, among other property, this victoria. Plaintiff on the day following the fire notified the defendant that she should look to it for indemnity for her loss under the insurance so effected in its name, and she so informed the representative of the insurance companies. Defendant denied all rights of the plaintiff to indemnity, and refused to include any damage to the victoria, in the proof of loss under the policies, above the amount due it for repairs upon the victoria before the fire. It is contended in its behalf that the insurance effected by it covered only its interest in the property destroyed or injured by the fire. If this is the true meaning of the contracts, then plaintiff has no cause of action.

The meaning of these contracts, like that of all others, is to be ascertained from the phraseology employed by the parties as embodying their intention, in the light of the circumstances under which they were made. Turning to the clause

of the policies under consideration, it appears that the insurance companies agreed to insure against loss and damage by fire the stock and material contained in the specified buildings, "either its own or held in trust, or on commission, or in storage for repairs, or sold but not delivered." This language appears to us as clearly and definitely embodying an intention that the insurance under the policies should attach to the property, in whichever of the conditions set forth it should be, whether owned by it, or owned by third parties but "held in trust," or under any of the other conditions specified by which it had the possession intrusted to it as representative of the owners, and for the return whereof it was responsible to them. There is no ambiguity in the subject or property insured, nor can we find any uncertainty in the interest insured. It includes the property of defendant and that of others held by it. To import into the policies the meaning contended for by defendant—that only its interest in the property held by it was insured—would require that terms of limitation be imported into the policies, so obviously necessary to give it such a meaning that it cannot be reasonably supposed they were omitted by the parties, and especially so in view of the plain and explicit declaration that the property itself is insured, against any loss or damage thereto, in amounts not exceeding the sum given in the policies. We are led to the conclusion that the policies cover the property, and are an insurance to indemnify against loss or damage to the property so covered, and that the contracts are without ambiguity or uncertainty. *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527; *Waters v. Monarch F. & L. A. Co.* 5 E. & B. 870; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 94; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606.

This leads us to ascertain whether the assured was so circumstanced in reference to this property that it could effect insurance for the benefit of itself and the interest of others in it. The fact is shown that defendant held the property for

the purposes of repair and sale for the owner. It is well established that a bailee or agent holding property for the purpose of repair or of sale may insure it against loss or damage by fire for the protection of his special interest and that of the owner, and that this insurance may be taken in the name of such possessor, and in case of loss the avails of the policy may be applied in satisfaction of his claim against the property, and, if there is an amount above such claim, he holds it for the owner. *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648; *Waring v. Indemnity F. Ins. Co., supra; Home Ins. Co. v. Baltimore W. Co., supra; Stillwell v. Staples,* 19 N. Y. 401; *Snow v. Carr,* 61 Ala. 363. Such insurance has commonly been supported upon the grounds that a person having a special interest in property for which he is responsible to the owner may protect himself in this manner, and, should he be unable to restore the property through loss by fire, he will thereby be assured of rendering its value to the owner to the extent of the indemnity. One of the requisites of such contracts is that it must appear from the contracts that the owner was within the contemplation of the parties when they made the contracts. This does not mean that each party must be ascertained when the policy issued, for it is presumed that the parties intended that the insurance provided for in the policy shall inure to the benefit of every person who assumes the relationship to the assured covered in the contracts, whenever a loss occurs to property covered by its terms. This presumption that every person assuming the specified relationship was within the intention of the terms of the policy is binding upon the insurer as well as the assured, and cannot be varied or contradicted unless it be shown that there was an understanding between the owner, the party effecting the insurance, and the insurer that such owner's interest was not to be included. But this can in no way affect the rights of other owners bearing the same relationship to the assured, when the terms of the contract include their interest. Neither

is it essential to validate such a contract that the insurance fasten upon specific property, nor need the owner be known at the inception of the agreement, for the very object of such insurance is to meet the shifting exigencies of trade and commerce. The insurers are supposed to have intended that all persons assuming the relationship prescribed by the policy were within the protection of the agreement, if, when informed of its existence, they assent to and "adopted the acts of the agent and thus entitled themselves to all the advantages of the contract as fully as if originally made by their express authority." *Stillwell v. Staples, supra; Bassett v. Hughes,* 43 Wis. 319; *McDowell v. Laev,* 35 Wis. 171; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606. The right of such adoption and ratification continues while the contract is in force, and the fact that the loss has occurred has been held not to preclude the owner from exercising it within a reasonable time thereafter. *Stillwell v. Staples, supra; Snow v. Carr, supra; Watkins v. Durand,* 1 Port. (Ala.) 251.

It is urged that, since plaintiff was not a party to the policies at their inception, they can be modified to express the intention of the original parties if they can show that the contracts do not embody the agreements actually made. This right, is, however, limited when third parties acquire an interest in the subject of the contracts, and the right no longer exists after the owner has sanctioned and adopted them, for the reason that he is no longer a stranger to the contracts, but, in legal effect, has become a party thereto, and thereafter the written contracts between the parties and those claiming under them cannot be contradicted, varied, or modified by parol. As stated in *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.* 55 Minn. 236, 56 N. W. 815:

"As to the rights which originate in the relationship established by the written contract, or are founded upon it, the rule against varying it applies." *Bassett v. Hughes, supra; Libby v. Mt. Monadnock, M. S. & L. Co.* 67 N. H. 587, 32 Atl. 772.

It is further contended that the court erred in awarding plaintiff a recovery, because it appears that the whole amount paid is not sufficient to pay defendant's damage, as shown by its proof of loss. It has been shown above that the policies must be construed to be an insurance of all the stock held by the defendant, whether its own, or held by it for others, under the conditions expressed in the terms of the clause covering this property. From this it follows that whatever amount was paid by the insurance company to indemnify such damage and loss must be paid to the owners in such proportion as the value of the property of each bears to the whole amount paid, except that the defendant has the right to indemnify itself in full, to the extent of its interest or lien on the property, out of the amount due for the loss. In *Snow v. Carr*, 61 Ala. 363, the court, speaking on this question, declares:

"That the sum at which the policy was valued may have been less than the value of all the articles consumed does not destroy the right of any for whose benefit the insurance was effected to his proportion of the proceeds."

Many of the cases cited above sustain this apportionment and application of the avails of the insurance, and are corroborated by the following: *Siter v. Morrs*, 13 Pa. St. 218; *Johnson v. Campbell*, 120 Mass. 449; *Boyd v. McKee*, 99 Va. 72, 37 S. E. 810; *Lucas v. Ins. Co.* 23 W. Va. 258.

The court found upon the evidence that the amount justly due plaintiff, as owner of the victoria, if defendant had included the damages to it ($537) in its proof of loss, amounted to $339.67, but allowed nothing out of said sum to defendant in payment of the special interest or lien it had on the property, and which is found amounted to $30. Deducting this amount would leave a balance in plaintiff's favor in the sum of $309.67. If we apply the foregoing proposition of law to the facts and circumstances of the case, namely, that defendant effected insurance of plaintiff's property, while in its custody and possession, for her; that plaintiff adopted

the contracts, and so notified defendant and the insurance companies before the proofs of loss were made to it; that defendant refused to include plaintiff's property, and settled the loss and surrendered the policies without her consent—it follows that, under the relation between plaintiff and defendant, the insurance effected by defendant covered the property, defendant was to be indemnified to the extent of its interest, and whatever amount was due on the policies above this sum for this property belongs to plaintiff, as owner, and defendant should have collected it under the policies in its name, as trustee of an express trust, under sec. 2607, Stats. 1898, as pointed out in *Strohn v. Hartford F. Ins. Co., supra,* and some of the New York cases cited above. We find nothing in the case of *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395, 80 N. W. 471, in any way conflicting with these conclusions; nor does the opinion of the court, in our view of its terms, declare that contracts of insurance like those in the instant case are not an insurance of the whole property for the protection of the interest of the assured and of the owner. In this view of the relationship of the parties, it is obvious that defendant violated a duty imposed by the contractual relation between it and plaintiff; and, when it omitted to include plaintiff's property in making proof of loss under the policy, it became liable for the damage resulting from such default.

It is claimed that plaintiff's cause of action as stated in her amended complaint is one sounding in tort, instead of contract. We do not so interpret the facts alleged. The allegations contain all the facts setting forth the contractual relationship of the parties, defendant's fault in omitting to perform its obligation imposed thereby, and a consequent pecuniary injury to her. Allegations of fact that the defendant has collected the avails of the policies, and retains them as its own, do not alter the character of the complaint, under the facts above stated. We think the court properly allowed the amendment of the complaint.

Error is assigned upon the ruling of the court sustaining an objection to the cross-examination of plaintiff's agent as to whether certain other insurance on complainant's barn covered this victoria. The record discloses nothing to indicate that this witness had testified on this subject in his direct examination, nor does it appear that any defense is pleaded to the effect that plaintiff's damage or loss was covered or paid her under any other policy than those involved in this case. Under these circumstances, the ruling was proper.

By the Court.—The judgment is modified by reducing the damages to the sum of $309.67, with interest amounting to $97.16, together with the sum of $45.63, costs and disbursements, amounting in all to the sum of $442.46, and as so modified the judgment is affirmed; respondent to recover her costs on this appeal.

WINSLOW and DODGE, JJ., dissent.

MERRILL and others, Executors, Respondents, vs. LADENDORF and another, Appellants.

October 19—November 15, 1904.

Mortgages: Foreclosure: Resale: Discretionary orders.

An application for a resale of property sold on foreclosure, based on inadequacy of the price at which the premises were struck off, is addressed to the sound discretion of the court, and will not be reversed on appeal where the preponderance of the evidence is to the effect that the value of the property is not much above the amount for which it was sold, and that, considering the character of the sale, the price obtained was not inadequate.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

At a foreclosure sale made March 7, 1904, the land was

bid in by Henry J. Pauly for $8,500, which was sufficient to satisfy the judgment and the expenses of executing the same and leave a surplus of $268.02. When the report of sale was presented for confirmation the parties, whose interests in the property would be fully extinguished by such confirmation,—*Christina Magdalena Ladendorf,* an insane person possessed of a life estate, and *Christina Tietjen,* possessing an estate in remainder,—appeared and applied to have such sale set aside and a resale ordered, because of inadequacy of the price obtained, and because they were not represented at the sale to protect their interest, on account of excusable inadvertence. The petition on behalf of such life tenant was made by her guardian. It stated upon information and belief that the value of the property was $15,000, and that the petitioner knew, upon a resale more than $8,500 could be obtained therefor. The petition on behalf of the person interested in remainder stated on information and belief that the property was worth $20,000. The only excuse given in the first petition for the failure of the life tenant to be represented at the sale was that her guardian was then confined to his house by sickness. No excuse was given as to the other party. There was opinion evidence in support of the application, that the value of the property was $11,250. In opposition thereto there was proof that such guardian was not sick on the day of the sale, or confined to his house for any reason, but was about attending to his business. There was also opposing opinion evidence by one person that the value of the property was $10,000; by another that it was $11,250; by another that it was $8,750, and that a judicial sale thereof for $8,500 was a good one of the kind; and by another that the value of the property at the most was $9,000, and that a compulsory sale thereof at $8,500 was fair. There was further evidence that the value of the property was largely speculative. The application for a resale was denied and the appellants appealed.

The cause was submitted on the brief of *W. O. Thomas,* for the appellants, and on that of *Austin, Fehr & Gehrz,* for the respondents.

MARSHALL, J. No certain proof was offered in support of the application, that a resale of the property would produce a sufficient sum in excess of the amount previously bid to make a resale beneficial to the petitioners. The statement in one of the petitions that it would sell for more than $8,500 at a resale might be true and the difference not sufficient to pay the costs of the second sale. If it were true that there was credible evidence that the value of the property was considerably in excess of $8,500, that might or might not indicate a fair probability that more than such sum could be obtained at a judicial sale. Moreover, in our judgment, the preponderance of evidence, upon which the trial judge acted, is to the effect that the value of the property was not much above the amount for which it was sold, and that, considering the character of the sale, the price obtained therefor was not inadequate.

The excuse given by the guardian of the life tenant for not being present at the sale was very clearly disproved.

In view of the foregoing and that the application was addressed to the sound discretion of the court, it does not seem that there is much room for argument as to whether the order complained of should be affirmed. We are unable to discover any good ground for saying that the trial court abused its discretion. Moreover, it seems pretty clear from the record, as an original proposition, that the conclusion reached below was right. The order appealed from must be affirmed.

By the Court.—So ordered.

JOHN MEUNIER GUN COMPANY, Respondent, vs. LEHIGH VALLEY TRANSPORTATION COMPANY, Appellant.

October 19—November 15, 1904.

Default judgments: Failure of defendant to appear: Notice of application for judgment: Pleading: Admiralty: Jurisdiction of state courts: Contracts.

1. Two days before the time for answering had expired, no notice of appearance or of retainer for defendant having been served, plaintiff's attorneys wrote defendant: "We are willing that the time for your appearance in the suit commenced against you, which expires on the 23d, should be extended for ten days, up to and including December 3d, on the assurance of your representatives that there is a probability of the matter being settled by that time, but we cannot consent to anything longer than that, and shall proceed with the lawsuit unless settled by that time." On December 7, plaintiff's complaint was verified, and, on proof of the default, after hearing the case, the court entered judgment for the plaintiff on December 8. *Held*, that not having appeared in the case, the defendant was not entitled to notice of the application for judgment.
2. In an action against a carrier on a contract of affreightment, for damages to goods consigned to plaintiff, the answer alleged that the goods were shipped by water under a bill of lading, wherein defendant was exempted from the perils of navigation, as well as by a general average bond, and that the damage was caused by the grounding of the vessel, and its becoming necessary to jettison and lighter the vessel, which was done. *Held*, that the pleading did not state a cause of action in admiralty jurisdiction, and therefore the state court had jurisdiction.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an appeal from an order entered January 16, 1904, refusing to vacate the judgment entered by default December 8, 1903, in favor of the plaintiff and against the defendant for $3,545.73. This action was commenced by the service of a summons on the defendant, a foreign corporation, by delivering the same to and leaving it with J. L. Kellogg

personally—the agent conducting the business of such corporation in this state—November 3, 1903. After some effort to settle the controversy, the plaintiff's attorneys wrote the defendant November 21, 1903, in which, among other things, they said:

"We are willing that the time for your appearance in the suit commenced against you, which expires on the 23d, should be extended for ten days, up to and including December 3rd, on the assurance of your representatives that there is a probability of the matter being settled by that time, but we cannot consent to anything longer than that, and shall proceed with the lawsuit unless settled by that time."

December 7, 1903, the plaintiff made its verified complaint, alleging, in effect, that during all the times therein mentioned the defendant was a common carrier of goods and passengers for hire, owning, running, and operating railway and boat lines for such carriage in Wisconsin, and from the city of New York to the city of Milwaukee; that April 18, 1903, the defendant received for the plaintiff, from the Winchester Repeating Arms Company, one certain car load of goods, described, to be by it transported from the city of New York to the city of Milwaukee, and the defendant promised and agreed to safely carry the same and deliver them to the plaintiff at Milwaukee in a good and proper condition, for which the plaintiff agreed to pay the agreed freight charges, amounting to $68 and over, and which sum was duly paid before the commencement of this action; that the defendant so received and accepted the goods to be so carried, and the defendant did not safely carry or deliver the goods as agreed, but so carelessly and negligently conveyed and cared for the same that a portion thereof were never delivered to the plaintiff, and were wholly lost, and the balance thereof were during such transportation so carelessly and negligently cared for and treated that they were greatly injured and damaged by water and cement coming upon such

goods, and greatly damaging them, and rendering them unfit for the uses and purposes for which they were purchased, as the defendant well knew—giving descriptions and value of the articles in detail, and demanding judgment for $3,421.73, with interest from June 29, 1903, with costs and disbursements of this action. December 7, 1903, one of the attorneys of the plaintiff made and filed an affidavit of default to the effect that more than twenty days had elapsed since the summons was served upon the defendant, and that no answer or demurrer to the complaint and no notice of appearance therein had been served upon the plaintiff's attorneys, or received by them. December 8, 1903, the trial court found the defendant to be in default, and upon hearing the case decided that the defendant was indebted to the plaintiff upon the cause of action mentioned in the complaint in the sum of $3,512.33, for which amount judgment was therein ordered to be entered, with costs, and judgment was entered therein accordingly on the same day, and written notice of the entry and docketing of that judgment was given to the defendant on the same day. December 11, 1903, the defendant made and served its verified petition to the trial court to vacate and set aside the judgment and let the defendant file and serve an answer, wherein was stated, in addition to the facts mentioned, that between the times of the commencement of the action and the entry of judgment there were certain negotiations for settlement, and an affidavit of merits, which petition was supported by affidavits relating to such loss and damage and negotiations to settle the same, which affidavits were in some respects controverted by affidavits on the part of the plaintiff and certain letters and correspondence between the plaintiff and defendant between June 29, 1903, and November 21, 1903. December 24, 1903, the defendant made, served, and filed its supplementary petition, accompanied by numerous affidavits and a verified answer, in which it was stated, in effect, in addition to admissions, that at all times

since May 23, 1903, it admitted its liability for certain goods of the plaintiff lost in transportation, and offered to pay them for such loss, subject to general average and insurance, and alleged that the goods were shipped in two lots—one by the steamer "Seneca," which arrived at Milwaukee May 22, 1903, and the other by the steamer "Wilbur," which arrived at Milwaukee May 30, 1903; that the goods were damaged as claimed; that such damage was caused solely by reason of the dangers and risks of navigation by the grounding of the vessel and its becoming necessary to jettison and lighter the vessel, which was done—all of which was assumed by the plaintiff by reason of the bill of lading made April 18, 1903, wherein it was stated that "marine risk on lakes insured at shipper's request and owner's expense," and also that "no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters," and the general average bond entered into by the parties May 25, 1903. Upon such showing the court refused to vacate and set aside the judgment and allow the defendant to defend, and that is the error complained of.

For the appellant there was a brief by *Markham, Hamilton & Markham,* attorneys, and *F. Herbert Janvier,* of counsel, and oral argument by *Talmage Hamilton.*

For the respondent there was a brief by *McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

Cassoday, C. J. It appears that negotiations and communications in respect to adjusting and settling the loss and damage complained of continued for more than four months prior to the commencement of this action. Eight days prior to the service of the summons the attorneys for the plaintiff informed the defendant, in writing, that they had been instructed by their client "that, unless something definite" should be "arrived at by the 1st day of November," they would "have to institute suit." The suit was commenced

November 3, 1903. November 21, 1903, and two days before the expiration of the time within which the defendant was required to appear in the case and answer, the plaintiff's attorneys, in response to something said on behalf of the defendant, wrote the letter, a portion of which is quoted in the foregoing statement. In that letter the defendant was plainly informed that the time for its "appearance in the suit" would expire two days thereafter, and that the same should be extended for ten days—up to and including December 3d—on the assurance of the defendant's representatives that there was a probability of the matter being settled by that time, but that they could not "consent to anything longer than that," and should *"proceed with the lawsuit unless settled by that time."* There could be no mistaking the language employed. Nevertheless, the defendant failed to appear in the case during the ten days mentioned, and did not appear in the case during the five days that followed prior to the entry of the judgment.

The rule of the circuit court provides:

"Service of notice of appearance or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance." Circuit Court Rule VIII. See sec. 2643, Stats. 1898.

In the case at bar there was no appearance. In fact, the defendant employed no attorney to appear in the case until after the judgment was entered. Not having appeared in the case, the defendant was not entitled to any notice of the application for judgment. No attempt was made to excuse such default. There is no claim that the defendant failed to appear in the case through its "mistake, inadvertence, surprise, or excusable neglect;" much less that there was any abuse of discretion in refusing to relieve the defendant from such judgment in the absence of any such "mistake, inadvertence, surprise, or excusable neglect." Sec. 2832, Stats. 1898; *Boutin v. Catlin,* 101 Wis. 545, 77 N. W. 910.

Counsel for the defendant contend that the facts alleged in the proposed answer show that the action is based upon a contract of affreightment to be performed on the Great Lakes, with a general average adjustment, and hence are matters of admiralty jurisdiction, of which the state courts have no cognizance; citing sec. 2. art. III, Const. U. S. It is true that "upon an ordinary contract of affreightment the lien of the shipper is a maritime lien, and a proceeding *in rem* to enforce it is within the exclusive original cognizance" of courts of admiralty. *The Belfast,* 7 Wall. 624. "The distinguishing and characteristic feature of such suit" in admiralty, said Mr. Justice FIELD, speaking for the court, "is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly." *The Moses Taylor,* 4 Wall. 427. The statute of the United States giving to federal courts such exclusive jurisdiction expressly saves "to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Subd. 8, sec. 563, R. S. U. S. [U. S. Comp. St. 1901, p. 457]; *The Moses Taylor,* 4 Wall. 411, 427, 431; *The Belfast,* 7 Wall. 624, 643. These cases have been repeatedly followed by this court. *Warehouse & B. S. Co. v. Galvin,* 96 Wis. 523, 527, 71 N. W. 804; *Reynolds v. Nielson,* 116 Wis. 483, 485, 93 N. W. 455. It is a common practice for state courts to take jurisdiction and determine questions of general average. *Nimick v. Holmes,* 25 Pa. St. 366; *Nelson v. Belmont,* 21 N. Y. 36; *Libby v. Gage,* 14 Allen, 261; *Emery v. Huntington,* 109 Mass. 431. It is enough to say that neither the complaint nor the proposed answer states a cause of action in admiralty within the principles of the authorities cited.

By the Court.—The order of the circuit court is affirmed.

THORP, Respondent, vs. MINDEMAN and wife, imp., Appellants.

October 19—November 15, 1904.

Contemporaneous contracts: Construing together: Note and mortgage: Negotiable instruments: Collateral agreements: Statutes: Indorsement "without recourse:" Principal and agent: Foreclosure: Receivers.

1. Under the rule that contemporaneous instruments relating to the same subject matter are to be construed together, construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties.
2. While an ordinary negotiable note, accompanied by the ordinary real-estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, and are parts of the same transaction, each relates to its own subject matter, and does not interfere with the other. Covenants in the mortgage to pay taxes and exhibit the receipts, to effect and maintain insurance on buildings for mortgagee's benefit, and that in case of default the mortgagee may insure and have a lien for the amount of premiums and taxes paid "added" to the amount of note, are simply agreements for the preservation of the security, are not intended nor fitted to qualify or affect in any way the absolute promises of the note, and do not enter into or change the note in the least, nor affect its negotiability.
3. Sec. 1675—1, ch. 356, Laws of 1899, requires, among other things, that negotiable paper must contain an unconditional promise or order to pay a sum certain in money, and be payable on demand or at a fixed or determinable future time. Sec. 1675—2 provides that the sum is certain, within the meaning of the law, though it is to be paid by installments, with provisions that upon default in payment of any installment or of interest the whole shall become due. And sec. 1675—4 declares that an instrument is payable at a determinable future time which is payable at a fixed period after date or sight, though payable before then on a contingency. *Held*, that an ordinary promissory

note, secured by a real-estate mortgage, is negotiable, although it provided that on default in interest or failure to comply with any of the conditions of the mortgage, the whole principal should, at the option of the mortgagee, become due and payable. *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, and *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, overruled.

4. Under sec. 1676—8, ch. 356, Laws of 1899, the addition of the words "without recourse" to an indorsement on the back of a negotiable note: "For value received, I hereby sell, transfer and assign the within note," does not impair the negotiable character of the instrument.
5. Such indorsement is a commercial indorsement, and not a mere assignment, and, when accompanying a transfer before maturity, the transferee takes the note freed from all equities.
6. In an action to foreclose a mortgage securing a negotiable note, the evidence considered, and *held* insufficient to establish that when plaintiff bought the note and mortgage from the mortgagee, the plaintiff made the mortgagee her agent, so as to charge plaintiff with the agent's knowledge.
7. In an action to foreclose a mortgage, where there was an ample showing justifying the appointment of a receiver with power to collect rents, etc., the mortgagor is not prejudiced by the inclusion in the receivership of a part of the premises on which the rent has been paid in advance for more than the period of redemption.

APPEAL from a judgment and order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action to foreclose a note and mortgage given by the defendants *Mindeman* and wife to one Henry Herman, the defense being an entire want of consideration. The note was a promissory note for $6,500, dated December 11, 1900, payable three years after date, with interest at five per cent. per annum, semiannually, and contained the following provisions inserted before the signature:

"The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal

shall, at the option of the mortgagee, or his representatives or assigns (notice of such option being hereby expressly waived), become due and payable without any notice whatever."

The mortgage accompanying the note contained the following provisions:

"Provided, always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the just and full sum of sixty-five hundred ($6,500) dollars three years after date with interest at five per cent. per annum, interest payable semi-annually according to the conditions of one promissory note and coupons bearing even date herewith, executed by the said *George Mindeman,* one of the parties of the first part, to the said party of the second part, and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said premises and shall deliver or exhibit receipts therefor to said party of the second part, his heirs, executors, administrators or assigns, on or before the first day of May next after such taxes shall have become due and payable, and shall insure and keep insured the buildings thereon or to be hereafter erected against loss or damage by fire in the sum of eight thousand dollars or over, in insurance companies to be approved by the said party of the second part, his heirs, executors, administrators or assigns, such insurance to be payable in case of loss to the said party of the second part, his heirs, executors, administrators or assigns, as his mortgage interest may appear, and the policy or policies of insurance to be held by him, and in default thereof it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to effect such insurance, and the premiums and other legal expenses and charges paid for effecting the same, together with interest thereon at the rate of ten per cent. per annum, shall be a lien upon the said mortgaged premises added to the amount of the said note, and secured by these presents until the payment of said note, then these presents shall be null and void. But in case of the nonpayment of any sum of money (either principal, interest or taxes) at the time when the same shall become due, or of

failure to insure said building agreeably to the conditions of these presents, or in case of failure to deliver or exhibit such receipt as above provided, or in case of failure on the part of said parties of the first part to keep or perform any other agreement, stipulation or condition herein contained, then in each case or all of such cases, the whole amount of the said principal sum shall, at the option of the said party of the second part, his heirs, executors, administrators or assigns, which may be exercised at any time after any default, without any notice whatever to the mortgagors or either of them, their heirs, executors, administrators or assigns, service or giving such notice in any manner being hereby expressly waived, be deemed to have become due, and the same with interest thereon at the rate aforesaid shall thereupon be collectible in a suit at law or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid."

It appeared from the testimony of the defendant *Mindeman,* which was taken under objection, that the note and mortgage was given to cover advances to be made to him by Herman, but that none were ever in fact made. September 11, 1902, Herman sold the note and mortgage to the plaintiff, who was an innocent purchaser thereof, and made the following indorsement upon the note:

"For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached and numbered four to six inclusive (previous interest coupons having been paid and surrendered), to *Josephine Thorp,* without recourse."

Findings and judgment of foreclosure were made and signed, and the *Mindemans* appealed from the judgment as well as from a subsequent order appointing a receiver.

Charles J. Weaver, for the appellants.

Thomas L. Kennan, for the respondent.

WINSLOW, J. The important question in this case is whether the note in suit is negotiable. The appellants argue

that the note and mortgage must be construed together as one contract; that, so construed, the note requires the performance of other acts besides the payment of money, and is rendered uncertain both as to amount and time of payment, and hence is nonnegotiable. The general rule that agreements contemporaneously executed and pertaining to the same subject matter are to be construed together is so familiar and so frequently acted upon that it needs only to be stated. The question how far, if at all, this rule imports into a promissory note the collateral agreements contained in an accompanying mortgage, is the question to be considered in this case. The collateral agreements contained in the mortgage, which the appellants claim are imported into the note and destroy its negotiability, are: *first,* the agreement that, in case of failure by the mortgagor to insure the buildings in the mortgagee's favor in approved insurance companies, the mortgagee may insure the same, and the premiums paid shall be a lien on the premises "added to" the amount of the note; and, *second,* the agreement that in case of failure to so insure, or to pay interest or taxes when due, or to deliver or exhibit tax receipts showing the payment of the taxes, then the whole principal shall become due at the mortgagee's option, and without notice. It will be observed that the only one of these agreements which the note contains *in terms* is the agreement that the principal shall become due without notice, at the option of the mortgagee, upon failure to pay interest or comply with any of the other conditions of the mortgage; but the argument is, in effect, that all of the collateral agreements in the mortgage have become a part of the note by virtue of the legal principle just stated. This is a decidedly revolutionary proposition. If it be true, both the business world and the courts have been sadly in error for many years. This court held at an early day that a note negotiable on its face retained its negotiable character notwithstanding it was secured by a mortgage upon real estate, and, when transferred before due,

carried the mortgage with it relieved of all equities (*Croft v. Bunster,* 9 Wis. 503); and that the words "secured by real-estate mortgage" upon the face of the note were not sufficient to charge the assignee with notice of any defense, nor of the terms of mortgage (*Kelley v. Whitney,* 45 Wis. 110; *Boyle v. Lybrand,* 113 Wis. 79, 88 N. W. 904). If all the agreements contained in every mortgage are, as matter of law, imported into the note, these propositions could not be true, for the general rule (except as changed by statute) is that negotiable instruments cannot be bound up and fettered with collateral agreements for the doing of other things besides the payment of money, and retain their negotiable character. Upon the principle contended for, the most simple real-estate mortgage would deprive the note which it secures of its negotiable character, because it would import into the note one or more collateral agreements which are not for the payment of money. Fortunately it is not necessary to give so violent a shock to the well understood principles of law governing the negotiability of notes and mortgages. The appellants' contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instruments relating to the same subject matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate

instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms; such as the payment of taxes, the insurance of houses, and the like. While the two instruments will be construed together whenever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant.

This idea is well expressed in the case of *Garnett v. Myers* (Neb.) 94 N. W. 803, where it is said:

"If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely

to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterwards allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself."

It may be added to this that provisions to that effect in the mortgage do not affect at all the absolute character of the promise to pay contained in the note, and hence do not affect its negotiability. A very interesting and instructive discussion of this question will be found in the opinion in the case of *Frost v. Fisher,* 13 Colo. App. 322, 58 Pac. 872, where the same conclusion is reached.

The propositions so far laid down seem incontrovertible if the principle is to be maintained that a note negotiable in form remains negotiable notwithstanding it is secured by an ordinary real-estate mortgage. As might be expected, we are referred to no authorities which really take issue with that principle, or squarely hold that the agreements of every mortgage are imported into the accompanying note. The nearest approach to such a holding, perhaps, is the case of *Noell v. Gaines,* 68 Mo. 649, where a provision in a deed of trust as to the time of payment of the debt was held to control the terms of the note in the hands of a purchaser with notice. A very vigorous and persuasive dissenting opinion was filed in this case, which forms instructive reading on this very question; but, in any event, the case does not reach the proposition that agreements in a mortgage, simply relating to the preservation of the security, are ever to be considered as imported into the note. Starting from the fundamental proposition that the ordinary negotiable note, accompanied by the ordinary real-estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, both being a part of the same transaction, but each relating to its own subject matter and not interfering with the other, just as a build-

ing contract and a bond to secure its performance are separate and distinct, let us consider in what respect, if any, the note and mortgage in this case differ from the ordinary note and mortgage.

As will be seen by reference to the papers themselves, the mortgage contains conditions requiring the payment of taxes on the premises by the mortgagor; the exhibition of the receipts therefor to the mortgagee; the maintenance of insurance on the buildings in approved companies, with the right to the mortgagee to insure in case of failure of the mortgagor, the expense to be a lien on the premises "added to the amount" of the note; also a provision that in case of failure to pay interest, taxes, or insurance, or to exhibit the tax receipts, the principal sum shall, at the option of the mortgagee, become due without notice. Turning to the note, we find that it provides that, if default is made in payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage, then the principal shall become due, at the option of the mortgagee, without notice. It will be noticed at once that none of the collateral agreements of the mortgage are in terms imported into the note except the agreement that the principal shall become due, at the mortgagee's option, in case of failure to perform any of the agreements of the mortgage. It will be noticed also that the other collateral agreements contained in the mortgage are simply agreements providing for the due preservation of the mortgage security, and not affecting in any way either the time of payment or the amount of the note. These agreements are the agreement to pay the taxes and exhibit the receipts, the agreement to effect and maintain insurance on the buildings for the mortgagee's benefit, and the agreement that the mortgagee may insure in case of default, and have a lien on the premises "added" to the note for the premiums paid. There was, indeed, a claim made that the agreement that the premiums paid should constitute a lien

added to the note meant that the note was to be increased by the amount paid, so that the amount of the note was thereby rendered uncertain; but we think it plain that the clause simply provides for the acquiring of a lien upon the premises in addition to the lien of the note. This meaning seems so obvious to us that we will spend no more time upon the suggestion.

These last-named collateral agreements, then, being simply proper agreements for the preservation of the security, and not intended nor fitted to qualify or affect in any way the absolute promises of the note, do not, upon the principles hereinbefore laid down, enter into or change the note in the least, nor affect its negotiability. Such being the case, we have only to consider the question whether the agreement that the whole principal of the note shall be due at the mortgagee's option in case of a failure to pay interest or perform any of the conditions of the mortgage renders the note nonnegotiable. Upon this question appellant places reliance upon the cases of *Continental Nat. Bank v. McGeoch,* 73 Wis. 332, 41 N. W. 409, and *W. W. Kimball Co. v. Mellon,* 80 Wis. 133, 48 N. W. 1100. In the first of these cases, an agreement inserted in the note, providing that the payee might sell collateral securities at any time if they declined in value, and apply the proceeds, less expense of sale, on the debt, and the balance should forthwith become due, was held to make the note uncertain as to amount and time of payment, and hence nonnegotiable. In the *Kimball Case,* an agreement that, in case of failure to pay any instalment, or of any attempt to dispose of or remove the chattel for which the note was given, the holder might declare the whole amount due, and collect same by suit or sale of the property, and, if there was a deficiency after sale, it should be payable on demand, was held to make both amount and time of payment uncertain, and hence make the note nonnegotiable. It must be admitted that both of these cases have a strong tendency to support the

position of the appellants upon the proposition that the time of payment is rendered uncertain by the agreement before us. Especially is this true of the *Kimball Case*. In that case the uncertainty as to time resulted from the fact that, in case the giver of the note failed to pay an instalment, or attempted to dispose of or remove the property sold, the holder might at once collect the whole. In the present case the agreement is that in case of failure to pay interest or keep taxes and insurance paid the holder may at once collect the whole. In both cases the contingency depends upon the acts or omissions of the maker of the note.

We should find it quite hard, if not impossible, to differentiate the two cases were it not for the provisions of the negotiable instruments law (ch. 356, Laws of 1899), which was passed since the decisions cited, and prior to the giving of the note in question. This law gives the general requirements of negotiable paper in sec. 1675—1, among which are the following:

"(1) It must be in writing signed by the maker or drawer. (2) Must contain an unconditional promise or order to pay a sum certain in money. (3) Must be payable on demand or at a fixed or determinable future time."

The law then provides, in sec. 1675—2, that the sum is certain within the meaning of the law though it is to be paid "(3) by stated instalments, with a provision that upon default in payment of any instalment *or of interest* the whole shall become due." The law further provides, in sec. 1675—4, that an instrument is payable at a determinable future time, within the meaning of the law, which is payable "(4) at a fixed period after date or sight, though payable before then on a contingency." These two provisions seem to cover this whole case, and leave really nothing to discuss. This note is payable at a fixed period after date, but may be made payable before that time upon the happening of certain contingencies which are within control of the maker. The latter

clause quoted would seem to have been added to meet just such cases as the present. Such agreements as we have here are of very frequent occurrence, and it was evidently the purpose to provide for them.

The case of *Wisconsin Yearly Meeting v. Babler,* 115 Wis. 289, 91 N. W. 678, is also somewhat relied on by appellants, but it evidently has no bearing on the case. In that case it was held that a clause in a note authorizing the confession of judgment *at any time,* whether due or not, rendered the note nonnegotiable, because the time of payment depended entirely on the whim or caprice of the maker. As an additional reason for the ruling, the fact that the negotiable instruments law allows the insertion of a clause authorizing a confession of judgment if not paid *at maturity* was also referred to.

While we have considered this question as absolutely settled by the negotiable instruments law, it must not be supposed that we have failed to examine and carefully consider the numerous cases cited by the appellants, mostly from western courts, as having some bearing upon this question. We have been unable to find that any of these cases really conflict with the general proposition laid down in the beginning, namely, the proposition that the ordinary provisions of a real-estate mortgage requiring payment of taxes and other acts by the mortgagor for the preservation of the mortgaged property are not imported into the accompanying note simply because the papers are simultaneously executed as a part of the same transaction. A number of them are cases decided by the Kansas Court of Appeals, and are, in substance, to the effect that, where a bond or note in terms refers to the mortgage, and declares it to be "a part of this contract," and the mortgage contains covenants to pay taxes, insure, keep buildings in repair, and the like, and that the entire sum shall become due in case of default in any of such agreements, this renders the bond or note nonnegotiable. Such are the cases of *Lockrow v. Cline,* 4 Kan. App. 716, 46 Pac. 720; *Chapman*

v. Steiner, 5 Kan. App. 326, 48 Pac. 607, and *Wistrand v. Parker,* 7 Kan. App. 562, 52 Pac. 59. It goes without saying that such cases have no bearing on the present case, because here there is no clause in the note making the mortgage a part thereof, or adopting its provisions, except the provision authorizing the whole amount to be declared due upon certain contingencies.

Another line of cases, from Nebraska, holds that, where a mortgage provides that the mortgagor shall pay the taxes levied on the *mortgagee* for or on account of the mortgage, this agreement destroys the negotiability of the note, because it renders the amount uncertain. *Garnett v. Meyers* (Neb.) 94 N. W. 803; *Consterdine v. Moore* (Neb.) 96 N. W. 1021; *Allen v. Dunn* (Neb.) 99 N. W. 680. Such seems also to be the effect of the case of *Brooke v. Struthers,* 110 Mich. 562, 68 N. W. 272. Without stopping to consider whether these decisions should be approved or not, it is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note.

In the cases of *Donaldson v. Grant,* 15 Utah, 231, 49 Pac. 779, and *Gilbert v. Nelson,* 5 Kan. App. 528, 48 Pac. 207, notes containing stipulations very similar to those found in the present case are pronounced nonnegotiable upon what seems to us very unsatisfactory reasoning, which we feel no inclination to follow, especially in view of the positive provisions of our negotiable instruments law before cited.

The cases of *Dilley v. Van Wie,* 6 Wis. 209, and *Elmore v. Hoffman,* 6 Wis. 68, are also cited as sustaining appellants' contention, but it is evident that they do not. In the *Dilley Case* the note contained an express clause subjecting it to the provisions of another agreement, made on the same day,

by which it appeared that the payment was subject to certain equities between the parties. The clause was rightly held to deprive the paper of its negotiable character. In the *Elmore Case* it was held that a collateral agreement made between the parties contemporaneously with a note, by which the payee agreed to give day of payment on the note till the happening of a certain named contingency, was admissible in evidence to defeat an action on the note in the hands of one who purchased the note with notice of the contemporaneous agreement. We hold, therefore, that under the present negotiable instruments law the note in the present case is negotiable, and in so holding it is evident that the cases of *Continental Nat. Bank v. McGeoch,* 73 Wis. 332, 41 N. W. 409, and *W. W. Kimball Co. v. Mellon,* 80 Wis. 133, 48 N. W. 1100, are overruled so far, at least, as they hold that such agreements create an uncertainty in the time of payment.

The next contention made by the appellants is that the written transfer of the note was not a commercial indorsement, but a mere assignment, and hence that the transferee took it subject to all equities. We think this contention cannot be sustained. The addition of the words "without recourse" does not impair the negotiable character of the instrument. Laws of 1899, ch. 356, sec. 1676—8. While there is doubtless some authority tending to support appellants' claim, we think that there can be no doubt that the transfer in the present case must be held to be a commercial indorsement under the decisions of this court in the cases of *Crosby v. Roub,* 16 Wis. 616; *Bange v. Flint,* 25 Wis. 544; *Murphy v. Dunning,* 30 Wis. 296. In all of these cases a negotiable note was transferred by attaching it to a negotiable bond which recited that the note was thereby "assigned and transferred" to the holder of the bond as security for the payment of the bond, there being no indorsement on the note itself; and this was held an indorsement within the law merchant. Here there is an agreement on the back of the note itself,

signed by the payee, by which he sells, assigns, and transfers the note to the plaintiff. The intent to pass title and make the note transferable by indorsement and delivery afterwards seems very plain. Such, also, seems to be the current of authority. 1 Daniel, Neg. Inst. (5th ed.) § 688c.

But it is argued that the evidence shows that the plaintiff made Herman her agent in buying the note and mortgage, and that Herman's knowledge was consequently her knowledge. There is really nothing in the evidence which substantiates this claim. The plaintiff was the only witness on the subject, and she testified that she purchased the mortgage of Herman herself, and paid the full principal sum therefor; that she went to his office for the purpose of buying mortgages, and told him she had some money to invest, and purchased this mortgage of him; that she looked at a number, and he read over several he had for sale; that he said they were first mortgages, and she took his word for what they were, and trusted his judgment. There is nothing to show that Herman was at any time plaintiff's agent, or had her money to invest, or that the transaction was anything but a purchase by the plaintiff and a sale by Herman. True, she says that she presumed Herman was acting for her, and that she took his judgment in the matter, but these statements are clearly merely the expression of the idea that she was relying on his statements that the mortgages were first mortgages, and desirable securities to purchase.

After judgment was entered upon affidavits showing that the premises were inadequate security for the loan, and were in need of repair, the court appointed a receiver, with power to collect rents, etc. The defendants *Mindeman* and wife appeal from this order "in so far as said order and from that part of said order, which applies to the lower flat of said building on said premises." It appeared by affidavit that the lower flat of the building was in possession of a tenant, who had paid rent in advance for more than the period of re-

demption, and it is urged that the receiver could collect nothing of him, and hence that this part of the premises should have been omitted in the order. We are unable to see any merit in this appeal. If there are vested rights in this tenant, doubtless he can protect them, and protect them equally well however the order appointing a receiver runs. Nor does the inclusion of the lower flat affect the defendant *Mindeman* in the least, because the rent has been paid to him according to the affidavit. There was an ample showing justifying the appointment of the receiver.

By the Court.—Judgment and order appealed from affirmed.

PREUSSER, Appellant, vs. THE SUPREME HIVE OF THE LADIES OF THE MACCABEES OF THE WORLD and another, Respondents.

October 19—November 15, 1904.

Life insurance: Benefit societies: Change of beneficiaries: Vested rights.

1. A married woman, to whom was issued a certificate in a benefit society payable to her husband (who, without special agreement with the wife, retained possession of the certificate and paid the dues necessary to keep the insurance in force), changed the beneficiary without the knowledge of the husband. The change was effected without complying in all respects with the rules of the benefit society, but it nevertheless issued to the wife a new certificate with different beneficiaries, the old certificate still remaining in possession of the husband. *Held*, that no circumstances were disclosed sufficient to give the husband any vested interest in the certificate or its proceeds.
2. In such case, the mere possession of the certificate or policy by the husband, who has voluntarily paid the dues thereon, all explainable by the marital relations, and consistent with the rights of the wife remaining undisturbed thereby, is not sufficient to show a vested right in the husband, nor to divest the right of the wife to change the beneficiary at will.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover on a beneficiary certificate. Lizzie Preusser, wife of appellant, acquired a membership with a beneficiary certificate of $1,000, in the defendant, the *Supreme Hive of the Ladies of the Maccabees of the World.* The mortuary benefits, by the terms of such certificate, were made payable to appellant. She delivered such certificate to her husband merely for safe keeping, so far as appears, where it remained till she died. He paid the dues necessary to keep the insurance in force, but without any special agreement with his wife to do so. Some five years after the certificate was issued, without the knowledge of her husband, she applied to the corporation to have it changed so that one half of the mortuary benefit upon the maturity thereof would go to appellant, and one half to her daughter *Lottie.* The old certificate was not surrendered, nor was any demand made upon appellant therefor. The rules of the corporation permitted such changes to be made upon condition of the surrender of the old certificate, or in lieu thereof, proof of its loss, or that it was in the possession of another who refused to deliver it, or of some other satisfactory reason why it could not be returned. The excuse given in this instance for not surrendering the certificate was that it was inconvenient to procure it. Such excuse was embodied in the application, considered with an explanatory letter as to the nature of the inconvenience, accepted as satisfactory and the application was granted, a new certificate being issued and delivered to Mrs. Preusser. She died in a few months after such change. Thereupon a claim was made on behalf of the daughter *Lottie,* under the new certificate, for one half of the sum payable thereon, and a claim was made on behalf of appellant for the whole thereof. The corporation was permitted to pay such fund into court. Such proceedings were thereafter taken that an issue was formed in this action to determine

their rights in respect thereto. *Lottie* being a minor appeared by a guardian *ad litem.* The result of the trial of such issue was that facts were found in harmony with the foregoing, and thereupon the court decided that it was competent for the corporation to waive strict compliance with its rule, as to the surrender of the first certificate before issuing the new one, and that plaintiff acquired no vested interest in the former by reason of the possession thereof and payment of the dues necessary to keep the insurance in force. Accordingly judgment was entered in favor of *Lottie* for one half of the fund deposited in court, as aforesaid, and for costs against plaintiff. Such judgment was entered and plaintiff appealed.

The cause was submitted for the appellant on the brief of *Edgar L. Wood,* and for the respondents on that of *F. J. Walthers.*

MARSHALL, J. That Mrs. Preusser had the absolute right to change the beneficiary in her certificate, subject to the rules of the corporation and such modifications thereof as it chose to make, unless plaintiff before the attempt in that regard acquired a vested interest therein, is ruled by *Berg v. Damkoehler,* 112 Wis. 587, 88 N. W. 606; *Waldum v. Homstad,* 119 Wis. 312, 96 N. W. 806, and numerous cases elsewhere.

Doubtless, the beneficiary named in a certificate or policy of insurance may obtain an interest therein, there being nothing in the contract of insurance to prevent it, precluding any change thereof to his prejudice without his consent (*Adams v. Grand Lodge A. O. U. W.* 105 Cal. 321–324, 38 Pac. 914), but there is no circumstance disclosed by the evidence or mentioned in the findings here sufficient to accomplish such result. As indicated in the statement, so far as appears, appellant voluntarily paid his wife's dues upon her membership. That does not suggest the existence of any agree-

ment between them giving him an interest in the insurance in consideration of making such payments, nor does the mere possession by him of the certificate, under the circumstances, suggest that it was delivered to him as a gift.

True, as counsel argues, in stating the rule in most of the adjudications as regards the right of the owner of a certificate of the kind in question to change the beneficiary without regard to the latter's wishes, it is commonly said that such right exists where the assured has paid the dues necessary to keep the insurance in force, but that by no means is a necessary condition of such right under all circumstances. The fact that the payments were made by one, other than the assured, does not form an exception to the general rule, unless such payment was characterized by circumstances giving the payor such an interest in the certificate, that at least a court of equity would protect it. Mere voluntary payment by a husband of his wife's expenses for insurance, explainable by the marital relations, and consistent with her rights as to such insurance remaining undisturbed thereby, cannot of itself be deemed sufficient to show a vested right in him therein. This case does not fall under such adjudications as *Adams v. Grand Lodge, supra, Lemon v. Phœnix Mut. L. Ins. Co.* 38 Conn. 294, but rather under such adjudications as *Fisk v. Equitable Aid Union* (Pa.) 11 Atl. 84; *Jory v. Supreme Council A. L. H.* 105 Cal. 20, 38 Pac. 524; *Brown v. Grand Lodge A. O. U. W.* 80 Iowa, 287, 45 N. W. 884; *Byrne v. Casey,* 70 Tex. 247, 8 S. W. 38; *Appeal of Beatty,* 122 Pa. St. 428, 15 Atl. 861; *Masonic B. Asso. v. Bunch,* 109 Mo. 560, 19 S. W. 25; and many other cases that might be referred to. They are all to the effect that during the lifetime of the assured, he may change the beneficiary at will, even though the certificate or policy is in the possession of the beneficiary who has paid the dues thereon.

By the Court.—The judgment is affirmed.

GOLDMANN, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

October 19—November 15, 1904.

Street railways: Traveler crossing track: Right of way: "Due care:" Personal injuries: Negligence: Contributory negligence: Evidence.

1. Due care in approaching a railway track can be satisfied only by full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril.
2. Reasoning is not due care when opportunity for observation exists.
3. A traveler crossing a railway track cannot rely on any assumption that a car is moving at a reasonable, or any other, rate of speed, where he has opportunity to observe the contrary.
4. No right of way can be said to exist in favor of a traveler crossing a railway track when, as established by the result, some diminution of the speed of the car was necessary to enable him to pass in safety.
5. It may be the most obvious negligence to exercise a clear right, and, if so, and contributing, it precludes recovery.
6. Plaintiff, approaching defendant's double tracks, when his horse's head was some fifteen feet from the nearest track, stopped and looked in one direction and saw no car approaching. He then looked in the other direction and saw a car about a block (389 feet) away, coming towards him very slowly, and started his horse at a speed of about two miles an hour to cross the tracks without again looking for a car. When the horse was on the first track, he then looked and saw the car about half a block away, coming very rapidly, and urged his horse to greater speed, reaching a velocity of about three miles an hour, but before getting across was struck and injured. *Held*, that plaintiff was guilty of contributory negligence precluding recovery.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

The plaintiff, according to his own statement, was driving south on Sixth street, in Milwaukee, when he came to State street, on which were double tracks of the defendant's rail-

way. As he reached a point where he was substantially on the north cross walk, and his horse's head some fifteen feet north of the north railroad track, he stopped, and looked west, and saw no car; then looked east, and saw one about a block (389 feet) away, coming towards him very slowly. He started his horse at a speed of about two miles an hour to cross State street, without again looking for a car. When he had progressed so that his horse was upon the track, and his front wheels close to the north track, his little daughter cried out to look out for the car. He then looked, and saw it about half a block away, coming very rapidly. He urged his horse to greater speed, reaching a velocity of about three miles an hour, but before getting across was struck and injured. Upon the trial the jury found by special verdict that the defendant was guilty of negligence proximately causing the injury, and that plaintiff was not guilty of contributory negligence, and that it was consistent with due care, after first seeing the car, to have failed to ascertain thereafter that its speed and position were such as to render dangerous an attempt to cross in front of it. Defendant made several motions, and, amongst others, one to set aside and reverse the answers to these two questions relating to contributory negligence, and for judgment in its favor upon the verdict so amended. Its motion was denied, and judgment rendered for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Spooner & Rosecrantz,* and oral argument by *C. M. Rosecrantz.*

For the respondent there was a brief by *W. H. Rubin,* attorney, and *C. H. Van Alstine,* of counsel, and oral argument by *Mr. Rubin.*

Dodge, J. This case falls so clearly within the principles announced in a long line of decisions, and so completely within the material facts of such cases as *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 16, 64 N. W. 319; *White v. C. & N. W.*

R. Co. 102 Wis. 489, 78 N. W. 585; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295, and *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142—that extended discussion or even reiteration of the reasons controlling it, cannot be justified. Due care in approaching a railway track can be satisfied only by the full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril. *Schroeder v. W. C. R. Co.* 117 Wis. 33, 38, 93 N. W. 837. The last moment for such observation in the present case was just before plaintiff's horse stepped upon the track on which plaintiff knew a car was approaching, for the evidence was undisputed that the movement of the horse was so slow and so without momentum as to approximate the plaintiff almost exactly to the situation of a foot passenger, as to whom it is pointed out that the single step onto the track is negligence unless, before taking it, he assures himself, by observation, of its safety, if the view is unobstructed. Had plaintiff, during the eight or nine seconds occupied in driving from the sidewalk crossing onto the track, looked even once more at the approaching car, he must have observed, according to his own description, that its speed was such as to make the crossing perilous unless he greatly accelerated the movement of his horse or that of the car was diminished. During all this period, however, with full opportunity to look and see, he proceeded without a glance, relying, if he thought at all, on his reasoning as to the safety. Reasoning, however, is not due care when opportunity for observation exists. It is only when deprived in some degree of such opportunity that one may, consistently with due care, rely on his judgment as to chances. *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823; *Schroeder v. W. C. R. Co., supra.* Neither can he, as counsel suggests, rely on any assumption that a car is moving at a reasonable, or any other, rate of speed, where he has opportunity to observe the contrary.

Respondent's counsel also seems to invoke the doctrine of a right of way in favor of plaintiff, and cites thereto *Tesch v. Milwaukee E. R. & L. Co., supra.* That no such right existed when, as established by the result, some diminution of the speed of the car was necessary to enable him to pass in safety, is fully declared in that case and in *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 335, 85 N. W. 1036; but whether it did or not is immaterial. It may be the most obvious negligence to exercise a clear right, and, if so, and contributing, it precludes plaintiff from recovery. *Brown v. C. & N. W. R. Co.* 109 Wis. 384, 85 N. W. 271; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 157, 85 N. W. 663.

As result of these considerations we deem it conclusively established beyond difference of opinion that "a person in the exercise of ordinary care, under circumstances similar to those surrounding the plaintiff, after first seeing the car, would have ascertained at some time thereafter, and before the horse reached the first track, that the speed and position of the car was such as to render an attempt to cross in front of the car dangerous," and that "want of ordinary care on the part of the plaintiff did contribute to produce the injury he received;" hence that the negative answers to these two questions—respectively the fourth and fifth of the special verdict—should have been set aside, and affirmative answer substituted by the court upon defendant's motion for such order.

By the Court.—Judgment reversed, and cause remanded with directions that the circuit court grant defendant's motion to change the answers to the fourth and fifth questions in the special verdict from "No" to "Yes," and upon the verdict, as so changed, to enter judgment for defendant.

MANSKE, Respondent, vs. CITY OF MILWAUKEE, imp., Appellant.

October 20—November 15, 1904.

Municipal corporations: Liability for negligence of member of fire department.

A city was empowered by its charter to organize a fire department, to be composed of such officers and men as should be required and employed in the management and conduct of its fire apparatus, to establish rules and regulations for such department, to purchase material, and to equip and run such department, including the power to employ the officers and men specified, and all other necessary help. Plaintiff, in the employ of a coal dealer, was assisting in weighing coal purchased by the city for use in its fire department, and in doing so it was necessary to move a pair of scales. B., an employee in the fire department of the city, was in charge of a tug operated and controlled by the city, to which the coal was to be delivered, and so interfered with the moving of the scales that, without the fault or neglect of plaintiff, they fell and injured plaintiff. *Held:*

(1) B., at the time of the injury, was acting within the scope of his employment.

(2) The city was engaged in the performance of a public service, from which it derived no special benefit or advantage in its corporate capacity, but which it was bound to see performed in pursuance of a duty imposed by law for the general welfare of its inhabitants, and was not liable for the personal injury occasioned by the negligence of B.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an appeal by the city from an order overruling its demurrer to the complaint alleging, in effect, that June 26, 1903, the plaintiff was an employee of the Milwaukee-Western Fuel Company, a corporation engaged in buying and selling all kinds of coal, and having its docks and principal place of business in Milwaukee; that as such employee it was the plaintiff's duty to help load and unload and weigh coal upon the docks of the company; that on the same day, and for

some time prior thereto, the defendant Brown was in the employ of the city, and as such it was his duty to assist in the loading and weighing of coal purchased by the city for the use of its fire department; that on the day named Brown was in charge of a certain tug operated and controlled by the city, which was anchored and fastened near the docks of the company in the city; that the company, pursuant to contract with the city, had agreed to deliver a certain quantity of coal to the city for the use of its fire department; that in pursuance of such contract, and to carry away the coal so purchased by the city, Brown called with the tug at the docks of the company; that before loading the coal on the tug it was necessary to weigh the same; that the plaintiff, with the assistance of other employees of the company, loaded a pair of scales on a cart and transported the same to that portion of the docks near which the tug was fastened; that when they arrived there the cart was stopped, and the plaintiff took hold of the scales with his right hand at a small opening at the bottom thereof intended for that purpose; that the plaintiff waited for his co-employees to assist him in taking down the scales, which were very heavy, and required the combined strength of four men to take them safely from the cart; that Brown then and there boasted that he could take the scales down alone without any assistance whatever; that Brown moved toward the scales; that the plaintiff and his co-employees told him to keep away; that such warning had scarcely been uttered before Brown recklessly, carelessly, and negligently pushed the scales along the cart, the bottom of which was inclined in the direction in which the scales were so pushed; that before the plaintiff had opportunity of removing his right hand from said opening the scales were negligently and recklessly pushed over the plaintiff's right hand by Brown, thereby severely bruising said hand and crushing the ring finger of that hand so that the same will have to be amputated; that the plaintiff fully believed that Brown would not

meddle with the scales after he had been warned to keep away; that Brown acted so suddenly that the plaintiff, in the exercise of due care, was unable to escape the consequences of Brown's reckless and negligent acts. Then follow several allegations as to the nature and extent of the plaintiff's injury and damages.

The cause was submitted for the appellant on the brief of *Carl Runge,* city attorney, and *W. J. Zimmers,* assistant city attorney, and for the respondent on that of *D. J. Dalton* and *W. F. Thiel.*

CASSODAY, C. J. We are constrained to agree with counsel for the plaintiff that at the time of the injury the defendant Brown was acting within the scope of his employment. The important question presented is whether the city is liable for his alleged careless and negligent conduct while so acting. The common council of the city was empowered to establish a fire department, and "to purchase fire engines and other fire apparatus, and to organize a fire department, composed of a chief engineer, one or more assistant engineers, and such other officers and men as shall be required and employed in the management and conduct of such fire engines and apparatus, and to establish rules and regulations for such department;" and also power to purchase material, and equip and run such department, including the power to employ the officers and men specifically named, "and all other necessary help." Subch. XIV of the charter [ch. 184, Laws of 1874], and particularly secs. 3 and 4. Of course, the common council not only had the powers thus expressly granted, but also such other powers as might be necessary or convenient to carry into execution the powers thus expressly granted. *Gilman v. Milwaukee,* 61 Wis. 592, 21 N. W. 640, and cases there cited. Such powers were sufficient to authorize the purchase of all necessary coal for the fire department, and to transport the same from the docks to the place of use, and

to employ all necessary help to do such work. It sufficiently appears from the complaint that Brown was, at the time of the injury, an employee of the city in the fire department. In conducting a fire department, the city, in the language of Chief Justice DIXON, "is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." *Hayes v. City of Oshkosh,* 33 Wis. 318. That case followed cases in Massachusetts, where it was held:

"A city is not liable for a personal injury occasioned by the negligence of the members, appointed and paid by the city council, of a fire department established by the city council pursuant to an act of the legislature." *Hafford v. New Bedford,* 16 Gray, 297; *Fisher v. Boston,* 104 Mass. 87.

Such seems to be the general rule. *Jewett v. New Haven,* 38 Conn. 368; *Wilcox v. Chicago,* 107 Ill. 334; *Robinson v. Evansville,* 87 Ind. 334; *McFadden v. Jewell,* 119 Iowa, 321, 93 N. W. 302, 60 L. R. A. 401; 20 Am. & Eng. Ency. of Law (2d ed.) 1205, and cases there cited; 2 Dillon, Mun. Corp. (4th ed.) § 976. Later cases in this court are to the same effect. *Kuehn v. Milwaukee,* 92 Wis. 263, 65 N. W. 1030; *Folk v. Milwaukee,* 108 Wis. 359, 84 N. W. 420. Such rule is applicable to the case at bar.

By the Court.—The order of the superior court is reversed, and the cause is remanded with direction to sustain the demurrer, and for further proceedings according to law.

ULLRICH, Respondent, vs. ULLRICH and others, Appellants.

October 20—November 15, 1904.

Partition: Surviving widow: Right to maintain action: Statutes: Construction: Estates: Dower.

1. Under the section of the statutes governing partition (sec. 3101, Stats. 1898), a widow in possession of the homestead, and having unassigned dower in the other real estate, cannot maintain an action of partition against the heirs of the husband.
2. Such want of right in the surviving widow to maintain an action of partition is not changed, either expressly or by implication, in the enactment of ch. 336, Laws of 1899, or of ch. 280, Laws of 1903.
3. An unassigned dower right is not an estate in lands.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action for partition of real estate. The complaint alleges that the plaintiff is the widow of one Ignatz Ullrich, deceased, who died January 29, 1903, leaving a homestead and about twenty other parcels of real estate in Milwaukee county; that the plaintiff is in possession of the homestead, and has a dower interest in the other lands; that three of the defendants are children and five are grandchildren of the deceased, all constituting the heirs at law of the deceased; that the said children and grandchildren own the said real estate subject to the homestead and dower rights of the plaintiff. Certain of the defendants are named as having some interest in the property, and the administrator was also joined as a defendant, and partition of the property is demanded. The defendants demurred generally to the complaint, and, the demurrer being overruled, the defendants appeal.

The cause was submitted for the appellants on the brief of *Austin, Fehr & Gehrz,* and for the respondent on that of *McElroy & Eschweiler.*

WINSLOW, J. The question is whether a widow in possession of the homestead, and having an unassigned dower interest in other real estate, can maintain a partition action against the heirs of the husband. This question seems to be settled by a mere reading of the first section of the chapter on partition, which says:

"All persons *holding* lands as joint tenants or tenants in common may have partition thereof by civil action. . . . Such action may be maintained by any person who has *any estate in possession* of the lands of which partition is sought, but not by any one who has only an estate therein in reversion or remainder." Sec. 3101, Stats. 1898.

As said in *Pabst B. Co. v. Melms,* 105 Wis. 441, 81 N. W. 882:

"The object of this statute was plainly to settle and obviate the disputes and difficulties attending the joint occupancy of lands, and to sever the undivided possession so that each person entitled to such possession should thereafter have a right to the sole possession of a certain part of the property, instead of a general right with the other co-tenants to the possession of the whole."

The idea is that there is a concurrent undivided possession of the whole by all the tenants, which is to be transformed into separate possession by each tenant of a specific part. There is no such concurrent, undivided possession existing here. The plaintiff is neither a joint tenant nor a tenant in common with any of the defendants as to any of the lands. She is in exclusive possession of the homestead, and she has only an unassigned dower right in the remaining lands. An unassigned dower right is not an estate in lands. *Howe v. McGivern,* 25 Wis. 525; *Farnsworth v. Cole,* 42 Wis. 403; 10 Am. & Eng. Ency. of Law (2d ed.) 146.

It is argued that by ch. 336, Laws of 1899, and ch. 280, Laws of 1903, the statutes governing the action of partition have been so far changed as to permit a person circumstanced as this plaintiff is to bring a partition action. Inspection of

these acts, however, clearly demonstrates that such is not the case. The first of these acts was intended to make complete provision for the ascertainment and adjudication of the rights of defendants in partition suits who were entitled to dower or homestead rights in the property, while the second of the acts was intended to give greater scope to the action in the matter of the litigation of conflicting interests and titles, as well as the assignment of homestead and dower rights; but neither of the acts affects the provisions of sec. 3101, *supra,* either expressly or by implication.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

LAEV LUMBER COMPANY vs. AUER and another, Appellants, and D. K. JEFFRIS LUMBER COMPANY, Respondent.

October 20—November 15, 1904.

Appeal: Findings by referee: Mechanics' liens: Lien of subcontractor: Notice to owner: Service: Sufficiency: Statutes.

1. It is not error to confirm the findings of a referee where they are supported by the evidence.
2. The notice required by the statute to be served upon the owner by one who claims a mechanic's lien as a subcontractor, where the owner is out of the state, is *held* properly served upon one who attended to the owner's business in his absence, and who had authority to represent him in transactions pertaining to his business affairs.
3. Under sec. 3315, Stats. 1898, a notice by a subcontractor to the owner, setting forth that the subcontractor was employed to furnish, and did furnish, material as specified, for the erection and construction of the building, with the amount due from the principal contractor, fulfills the requirements of the statutes. It is not necessary that the notice should state that, at the time of the sale to the principal contractor, it was agreed that the material was furnished to be used "for or in or about" the erection or construction of the building. MARSHALL, J., dissents.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

An action to enforce a lien for material furnished by plaintiff in the construction and erection of houses for the defendant *Louis Auer.* The cause was referred, and the referee found the following facts:

The defendant *D. K. Jeffris Lumber Company* is a duly organized corporation of this state, dealing in lumber. The defendant *Louis Auer* was at the time of these transactions the owner of the real estate described in the pleadings, and situated in the city of Milwaukee. On or about March 1, 1897, he entered into a contract with one John Ryan, a contractor and builder, for the erection and construction of the houses described in the referee's report. The *D. K. Jeffris Lumber Company* sold and delivered to John Ryan lumber and shingles of the value of $212.45. This lumber was sold by the *D. K. Jeffris Lumber Company* to be used and it was used by the defendant John Ryan for, in, and about the erection and construction of the buildings for the defendant *Louis Auer* on the real estate above referred to. The last charge for this material was April 15, 1897. On June 12, 1897, the *D. K. Jeffris Lumber Company* gave notice to *Louis Auer* and the *United States Fidelity & Guaranty Company,* claiming a subcontractor's lien, by serving on them the following notice:

"To *Mr. Louis Auer* and the *United States Fidelity & Guaranty Company*—

"GENTLEMEN: You will please take notice that the undersigned, the *D. K. Jeffris Lumber Company,* a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, was employed by John Ryan, doing business under the name of the John Ryan Lumber Company at the city of Milwaukee, Wisconsin, to furnish lumber and materials as set forth in the annexed statement of account marked 'Exhibit A' at the prices therein set forth; that no part thereof has been paid, but there is still due thereon from said John Ryan to the *D. K. Jeffris Lumber*

Company the sum of Two Hundred and Forty-Four Dollars and twenty-five cents ($244.25); that said lumber and materials were purchased by said Ryan on the 15th day of April, 1897, were intended by him to be used and were actually used in and about the erection and construction of your five dwelling houses and two flats situated in the city of Milwaukee, county of Milwaukee and state of Wisconsin, in the Sixteenth Ward, on land in the Southwest Quarter of Section thirty (30) in Block bounded on the North by Grand avenue, on the east by Twenty-fifth street, on the South by Sycamore street, and on the West by Twenty-sixth street, more particularly described as follows, to wit: In Block One (1) Cross and Ludington's Addition the South Sixty-seven (67) feet of the North Two Hundred Seventeen (217) feet of the East One Hundred Fifty-one and sixty-six hundredths (151.66) feet and the East One Hundred Twenty (120) feet of the South One Hundred Thirty (130) feet, being part of the present Lots Eleven, (11) Twelve (12) and Fourteen (14), and all of Lots Thirteen (13), Twenty-one (21), Twenty-two (22), Twenty-three (23), and Twenty-four (24), in said Block One (1).

"Please take further notice that the said *D. K. Jeffris Lumber Company,* the undersigned, hereby claims a lien upon said dwelling houses and flats and the lots upon which the same are situated for the lumber and materials furnished, in accordance with chapter 143 of the Revised Statutes of the State of Wisconsin and the acts amendatory thereof, and upon all the right, title and interest which you had in said lands upon which said houses are situated at the time said lumber and materials were furnished and delivered to the amount of Two Hundred and Forty-four Dollars and Twenty-five cents ($244.25) as aforesaid.

"Dated Milwaukee, June 12th, A. D. 1897.

"Yours respectfully,

"D. K. JEFFRIS LUMBER COMPANY,

"By STARK & HANSEN, Its Attorneys."

Giving amount due therefor, with attached statement, properly signed.

The *D. K. Jeffris Lumber Company* filed its claim for lien July 16, 1897, on the property, and brought this action with-

in due time to recover the amount due and to establish their lien.

Upon the confirmation of the referee's report by the court, judgment was awarded for the amount due, and a foreclosure and sale of all of defendant's interest in so much of the property as might be found necessary to satisfy the judgment. This is an appeal from the judgment by the defendant *Louis Auer,* owner of the property, and by the defendant the *United States Fidelity & Guaranty Company,* the surety of the principal contractor to protect the owner against mechanics' liens.

For the appellants there was a brief by *Winkler, Flanders, Smith, Bottum & Fawsett,* and oral argument by *F. H. Remington.*

Otto R. Hansen, for the respondent

SIEBECKER, J. It is contended the court erred in confirming the finding of the referee to the effect that the material furnished by the *D. K. Jeffris Lumber Company* was sold and delivered to be used by the principal contractor for, in, and about the erection and construction of the several buildings of the defendant *Louis Auer.* Upon examination of the proof, we find that this finding is supported by the evidence of the salesman, Mr. Brink, who was in the employ of the lumber company, and made the sale of the material to Mr. Ryan, the principal contractor. He testified that the sale of the material was made by him upon bills presented by the contractor, specifying the materials required in the construction of these buildings, and furthermore that the lumber was sold and delivered for that purpose. It is not questioned but that the material was in fact used for, in, and about the erection and construction of the buildings owned by the defendant *Louis Auer.*

It is urged that the referee erred in the finding, approved by the court, that the *D. K. Jeffris Lumber Company* made claim for a materialman's lien by giving notice in writing,

as required by the statute, to the owner of the buildings, that it had been employed by the principal contractor to furnish and that it did furnish him materials, with a statement of the material furnished, and the amount due therefor from the principal contractor. This finding is first assailed upon the ground that no proof of the proper service of this notice upon the owner was made. The statute provides that such service may be made upon the owner or his agent, if to be found in the county where the property is situated, and, if neither can be found therein, by filing the notice in the office of the clerk of the circuit court of such county. The notice was served upon Mr. Fehr, then in the employ of the owner, who was out of the state. It appears that Fehr attended to the business of *Mr. Auer* in his absence, and had authority to represent him in transactions pertaining to his business affairs. These circumstances, as established by the evidence, clearly show service of this notice upon the owner's agent.

It is contended further that the written notice served is insufficient, under the requirements of the statute. Appellants argue that this notice should state that at the time of the sale of this material to the principal contractor it was agreed that the material was furnished to be used "for or in or about" the erection or construction of the buildings. The statute (sec. 3315, Stats. 1898) provides that a subcontractor of a principal contractor, furnishing any material to such principal contractor, "in any of the cases mentioned in the preceding section shall be entitled to the lien and remedy given by this chapter; if within sixty days after . . . furnishing such materials, he shall give notice in writing . . . setting forth that he has been employed by such principal contractor . . . to . . . furnish and has . . . furnished such . . . material," etc. The words "such material" manifestly refer to material furnished under the circumstances and conditions of the preceding section, giving a lien to the principal contractors for ma-

terial furnished to be used "for or in or about" the erection or construction of buildings. It is apparent that no such lien can be maintained unless the material so furnished was used "for or in or about" the erection or construction of the building. Does the statute, however, require these conditions of the sale and delivery of the materials so furnished to be set forth in the notice? The statute requires that the notice shall set forth that he has been employed by the principal contractor to furnish and that he has furnished such material, with a statement of the material furnished, and the amount due therefor from the principal contractor, and that he claims the lien given by the chapter. The requirement that the subcontractor shall set forth in the notice that he has been employed to furnish and has furnished such material does not import that the purposes and conditions of the sale and delivery of the material to the principal contractor shall be set out in the notice. If it sets forth the facts that he was employed to furnish and that he did furnish material as specified for the erection and construction of the building, with the amount due from the principal contractor, the terms and conditions of the statute are fulfilled. The purposes of this statute are twofold—first, to secure payment to persons who furnish material or perform labor upon the structures therein mentioned; and, second, to apprise the owner that a claim therefor is made for the amount due for such labor or material. These purposes are fulfilled by a notice setting forth the facts as above stated. We find no express requirement in the language of the statute that the terms and conditions of furnishing the material to the principal contractor should be set out in the notice for a claim for a lien, and we find that the objects of the statute are fully accomplished by a notice for a claim of a lien setting forth that the claimant was employed by the principal contractor to furnish and that he did furnish material as specified for the erection and construction of the building. The notice given by the *D. K. Jeffris Lum-*

ber Company meets these requirements, and is sufficient under the statute.

We find no errors in the record, and must affirm the judgment.

By the Court.—The judgment is affirmed.

MARSHALL, J. I am unable to agree with my brethren as to the sufficiency of the notice served upon the proprietor of the building. That grows out of inability to agree with them as to the meaning of sec. 3315, Stats. 1898.

It is conceded as to the facts of this case that:

(1) Sec. 3314 made it a condition precedent of the right of the principal contractor to acquire a lien upon a building for material furnished to the proprietor thereof that such material shall be furnished "for or in or about the erection, construction, repair," etc., "thereof."

(2) A subcontractor can only acquire a lien, where, if the material were furnished by the principal contractor, he might do so.

(3) The lien petition in either case must necessarily show that the materials were furnished as specified in sec. 3314.

(4) It is a condition precedent to the right of a subcontractor to acquire a lien that he shall have complied with sec. 3315, as to giving notice to the proprietor of the building, and that it is essential to such notice that it contains all the features indicated by such section.

(5) The notice given by the subcontractor in this case did not inform the proprietor of the purpose for which the material was furnished;—that it did no more than to inform him that the respondents sold the material mentioned to the principal contractor, and that the latter intended to use the same in or upon the building in question, and that the same was so used; and that the subcontractor claimed a lien upon such building under ch. 143, Stats. 1898. All of which might be true and the respondent, at the time of the sale of the mate-

rial, have had no idea whatever as to what use the purchaser intended to put the same to, much less that the seller furnished such material on the faith of any prospective use thereof.

It is held here that sec. 3315, aforesaid, only requires the notice to show that the subcontractor furnished the principal contractor material of a lienable kind, the agreed price therefor, the amount due for the same and that the former claims a lien for such amount upon the building specified, under ch. 143 of the statutes;—that the notice is good though it be entirely silent as to whether the material was furnished on the faith of the building or not. I cannot agree to that. To me the statute reads plainly otherwise.

Section 3314, aforesaid, so far as material to the matter under discussion, reads this way:

"Every person who . . . as principal contractor . . . furnishes any materials . . . for or in or about the erection, construction, repair," etc., ". . . of any dwelling house, . . . shall have a lien thereupon," etc.

Sec. 3315, aforesaid, so far as it concerns this case, reads this way:

"Every person who, as subcontractor of a principal contractor . . . furnishes any materials . . . in any of the cases mentioned in the preceding section may have the lien and remedy given by this chapter if, within sixty days after . . . furnishing such materials, he shall give notice in writing to the owner, or his agent, of the property to be affected by such lien . . . setting forth that he has been employed by such principal contractor . . . to furnish or has furnished, *such* . . . *material,* with a statement of . . . the materials furnished, the amount due therefor from such principal contractor . . . and that he claims the lien given by this chapter."

Is it not perfectly plain that the words *"in any of the cases mentioned in the preceding section"* refer to that part of sec. 3314 above quoted? Again, is it not perfectly plain that the words "to furnish, or furnished such material" refer to the preceding words "in any of the cases," etc., and refer thence

to the aforesaid feature of sec. 3314? I cannot escape the conclusion that it is. If I am right, then the true meaning of the section can readily be made unmistakable by interpolating into it in place of "in the cases mentioned in the preceding section" the antecedent thereof, and in place of *"been employed by such principal contractor to furnish, or has furnished such materials"* that which such words relate to, thus:

"Every person who, as a subcontractor of a principal contractor . . . *furnishes any materials for or in or about the erection, construction,* etc., *"of any dwelling house,"* etc., "may have the lien given by this chapter if, within sixty days after furnishing such materials, he shall give notice in writing to the owner, or his agent, of the property to be affected by such lien . . . setting forth that he has . . . *furnished materials for or in or about the erection, construction, repair,"* etc., . . . *of any dwelling house,* with a statement of the . . . materials furnished, the amount due therefor from such principal contractor . . . and that he claims the lien given by this chapter."

I am unable to see why my process of reasoning is not legitimate and perfectly logical and this result inevitable: the notice in this case was clearly insufficient, and the judgment appealed from should be reversed.

In re Bradley's Will.

October 20—November 15, 1904.

Wills: Construction: "Residue": Lapsed legacies: Distribution.

1. A testator devised certain of his estate to his wife, and, after certain annuities, all the "residue" to his wife, two brothers and an adopted son, share and share alike, to each an undivided one-fourth share thereof. He further provided that in case his adopted son should not attain twenty-one years his share should be equally divided between the wife and two brothers. The annuitants and the wife predeceased the tes-

tator, who afterwards remarried, the second wife surviving him. *Held*, that it could not be said that the testator used the word "residue" in his will in other than its usual and legal meaning, from which is excluded the dominant widow's right, and that the residue was properly ascertained by deducting from the general estate the debts and the amount necessary to satisfy the widow.

2. In such case, the lower court properly distributed such "residue," one-fourth each to the brothers and adopted son as legacies under the will. The remaining fourth, by lapse of the bequest thereof to the first wife, became intestate property and was properly assigned to the adopted son under the laws of descent.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

In 1879 William H. Bradley made his will, whereby he devised and bequeathed to his wife, Emma Bradley, the homestead, its furnishings, etc., and to three aunts annuities of $100 each, and as to all the "residue" provided:

"I give, bequeath and devise (the same) to my said wife, Emma H. Bradley, and my said brothers, *Edward Bradley* and *James W. Bradley,* and to my adopted son, *William Turner Bradley,* share and share alike, so that each of them shall be entitled to an undivided one-fourth share thereof."

He further provided that in the case of the death of the adopted son before attaining the age of twenty-one years his share should be equally divided between the wife and the two brothers, so that they should each receive one third of the remaining portion of said estate. The three annuitants, as also the wife, Emma Bradley, predeceased the testator. On the 5th day of January, 1903, he married another wife, and died on the 7th day of January, 1903. The share of the estate to which the widow was entitled by law, being one third, of course exceeded the one fourth of the residue which would have gone to Emma Bradley under the will had she survived the testator. The county court, upon petition for distribution, adjudged that the expenses, debt, legacies, and legal

share of the widow should be paid generally out of the estate; that the remainder, after such payments, constituted the residue, and that of such residue one fourth should be distributed to each of the appellants, *Edward Bradley* and *James W. Bradley,* and one fourth to *William Turner Bradley* as legatee; that the remaining one fourth, by lapse of the bequest thereof to Emma Bradley, became intestate estate, and passed by descent to *William Turner Bradley,* whereby the latter became entitled to one half of the residue. From this judgment an appeal was taken to the circuit court, where it was affirmed, and the two brothers now appeal to this court from such affirmance.

For the appellants there was a brief by *Van Dyke & Van Dyke & Carter,* and oral argument by *G. D. Van Dyke.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and *Charles Quarles,* of counsel, and oral argument by *Charles Quarles.*

Dodge, J. By his will the testator bequeathed to each of the appellants one fourth of the residue of his estate. Residue is variously defined as "that which remains after discharging all legal and testamentary claims on the estate." *Eyre v. Marsden,* 4 Mylne & C. 231, 243. "That which is left after the payment of charges, debts and particular legacies." *Phelps v. Robbins,* 40 Conn. 250, 264. "That which remains after all paramount claims upon the testator's estate are satisfied." *Tomlinson v. Bury,* 145 Mass. 346, 14 N. E. 137. "All, of which no effectual disposition is made by will other than [by] the residuary clause." *Skrymsher v. Northcote,* 1 Swanst. 570; *Morton v. Woodbury,* 153 N. Y. 257, 47 N. E. 283. "All property subject to be bequeathed by her not otherwise effectually disposed of." *Harrington v. Pier,* 105 Wis. 485, 499, 82 N. W. 345. While, of course, the word may be used in a different sense, as to describe the remainder of a fund or indeed of the whole estate after deducting merely

some particular charges or bequests, the presumption is very strong that it is used in the general sense above defined, unless the contrary clearly appears from the context. *Phelps v. Robbins, supra; Harrington v. Pier, supra.* It is agreed by counsel that the statutory provision for a widow not named in the will, under sec. 2172, Stats. 1898, is one of those "charges" or paramount claims, which, like a debt, must be deducted before the residue is ascertained; that it is not a part of the "property subject to be bequeathed," so that, under *Harrington v. Pier,* it might be included in the residue. *Ford v. Ford,* 88 Wis. 122, 59 N. W. 464; *Gallagher's Appeal,* 87 Pa. St. 200. From the foregoing premises the conclusion is syllogistic that the residue of William H. Bradley's estate was that, and only that, which remained after satisfying the widow's paramount claims thereon. Of that residue one fourth is, by the assailed decree, awarded to each of the appellants, which, upon the surface, would seem to fully satisfy their right.

Against this conclusion appellants' contention is that we must construe this will as giving to each of the residuary legatees one fourth of the entire estate after payment merely of debts and expenses, and that, there being one fourth of that estate intestate by lapse of the legacy to Emma Bradley, such undisposed-of portion should be first applied in satisfaction *pro tanto* of the widow's third before any deduction should be made from the persisting legacies of one fourth each to the son and two brothers. Many authorities are cited in favor of the general rule that any undisposed-of portion of the estate should first be exhausted in discharging debts and expenses before any deductions are made from legacies for that purpose. Argument is also made in favor of a scheme of so-called "marshaling the assets" so as to reimburse to legatees out of any intestate property any abatement which their respective legacies suffer by reason of existence of general burdens or charges upon the estate. These are but different

phases of application of the well-recognized doctrine that due regard for a testator's wish and intent requires that particular gifts made by him should be accorded full effect, if possible, and that any property not expressly disposed of he probably would desire should be used to render completely effective the dispositions actually declared. In appellants' contention for the application of such doctrine here, however, there lurks obvious fallacy. Their argument proceeds on the assumption that by the will something is expressly given to each of them which suffers abatement or diminution if the widow's share be satisfied out of the general estate. To reach that view they necessarily treat the will as if it gave to each of them one-fourth of the net estate—i. e., the entire estate above debts and expenses—so that, if they receive anything less, the gift to them suffers abatement. The net estate is, however, clearly distinguished from residue. *Ford v. Ford,* 88 Wis. 132, 59 N. W. 464; *Harrington v. Pier,* 105 Wis. 498, 82 N. W. 345. By this will they are given each one-fourth of the residue, and not of the net estate. Amongst a multitude of decided cases, both English and American, no such marshaling or application of other funds in exoneration, as contended for here, in favor of residuary bequests, finds support, except from *Kirkpatrick v. Rogers,* 42 N. C. (7 Ired. Eq.) 44, followed in the same court by *Swann v. Swann,* 58 N. C. (5 Jones, Eq.) 297, and *Miller v. London,* 60 N. C. (1 Winston, Law & Eq.) 628. The contrary view is sustained by *Eyre v. Marsden,* 4 Mylne & C. 231; *Shuttleworth v. Howarth,* 1 Craig & P. 228; *Trethewy v. Helyar,* 4 Ch. Div. 53; *Fenton v. Wills,* 7 Ch. Div. 33; *Blann v. Bell,* 7 Ch. Div. 382; *Jones v. Caless,* 10 Ch. Div. 40; *Briggs v. Hosford,* 22 Pick. 288. The reasoning of these English cases is to the effect that by the use of the term residue a testator charges upon the general estate all debts, legacies, and other burdens; that no residue exists until such burdens have been paid. In this view it is a solecism to speak of discharging a debt or other charge

out of the residue, or by application of any particular share of the residue. Before the residue exists for assignment or apportionment, all debts and burdens have necessarily and by very force of the terminology been paid, and do not exist. Hence in every case except those cited from North Carolina, where lapse occurred in a share of a pure residuum, courts have refused to treat that share differently from those of the other residuary legatees. MALINS, V. C., who in *Scott v. Cumberland,* L. R. 18 Eq. 578, and *Gowan v. Broughton,* L. R. 19 Eq. 77, was thought to have questioned the authority of *Eyre v. Marsden,* 4 Mylne & C. 231, subscribes fully to the reasoning above stated, and in *Jones v. Caless, supra,* distinguishes his two former decisions, for that no charge of debts and expenses on the general estate was made by the will either by use of the term "residue" or otherwise. Appellants seem to concede full force to this reasoning so far as debts are concerned, for no question is raised upon the court's action in causing those to be paid out of the general estate. No attempt is made, however, to show why the charge for the widow's share is in any wise distinguishable from debts in this respect, except, perhaps, by a reference to *Ford v. Ford, supra,* where it was held that the renouncing widow's share should be considered part of the "net estate," while the debts should not. The distinction, however, between net estate and residue has already been indicated, and the result of that distinction is, obviously, to exclude from the latter term a widow's legal share as completely as debts or expenses. The North Carolina cases undoubtedly reject, without discussing it or noticing the cases, the reasoning of the above-cited English authorities, and hold, though the lapse was of a share of the residue, that there should first be found a fund resulting from deduction of all specific legacies, but not of the debts and expenses; that this fund should be divided between the three residuary bequests; and that the one third pertaining to the bequest which lapsed, being intestate estate, should be applied

to payment of debts and expenses to the relief, complete or partial, of the other two shares of the so-called residue. Just why any general money legacies should not have been paid out of that lapsed share as well is not stated. We cannot subscribe to the view of those decisions. It seems to us to pervert the meaning of the term residue, and under the guise of exoneration, to really indulge in augmentation of the other residuary legacies above what the words of the will conferred. By the payment of such burdens out of the general estate the residuary legacies are not abated. True, the residue is lessened, but it is only the residue, whatever it may be, which is by the will given to these legatees.

Argument is advanced to support intention of testator to give one fourth of the net estate generally to each of the appellants, because otherwise is enhanced the share of the son to whom, in express words, is given only one fourth. We cannot think this purpose sufficiently plain to overcome the presumption that testator used the word residue in its proper sense. The adopted son was the natural object of his bounty in preference to the brothers. The possible death of the wife before himself must have been in contemplation of testator, for he considered and provided for the less probable contingency of the son's death. We deem much stronger an inference in favor of a knowledge and purpose that the son's share might be enhanced by the death of his mother before her husband, as it in all probability would be, by inheritance from her, in case of her death after she had received her share of the testator's property.

Appellants suggest as a further reason why this widow's share should not be treated as one of those burdens to be satisfied before the residue is ascertained, that it could not have been in contemplation of the testator when he framed his will. We fail to discover the force of that suggestion. The very use of a residuary phrase indicates uncertainty as to what will remain of an estate, otherwise specific amounts

would naturally be bequeathed. Necessarily what the residue may be cannot be known to the maker of any but a deathbed will, for his pecuniary condition may change at any time. William H. Bradley might have signed a bond for $17,000 two days before his death, and the effect on the residue of his estate might have been the same as this marriage, and equally outside of his anticipation at the time of executing the will. We presume appellants would not have resisted inclusion in the residue of a sudden increase of testator's fortune after the making of the will, although it might have been unexpected, but there would be the same reason for assuming an intent of testator to exclude it as that now advanced with reference to this unexpected burden.

To conclude, however, none of the considerations urged by appellants are sufficient to convince us that the testator used the word "residue" in this will in other than its usual and legal meaning, from which is excluded this dominant widow's right, that the residue has been properly ascertained by deducting from the general estate the debts and the amount necessary to satisfy the widow, and that the one fourth of that residue distributed to each of the appellants is all that the will gives them according to its terms.

By the Court.—Judgment affirmed.

LOIZEAUX, Appellant, vs. FREMDER, Respondent.

October 20—November 15, 1904.

Mortgages: Promissory notes: Assignment: Payments to assignor: Estoppel: Negligence: Married women: Separate estate: Contracts.

1. In an action to foreclose a mortgage, the negotiability of the note accompanying the same considered, and *Thorp v. Mindeman, ante*, p. 149, followed.
2. A debtor must pay a negotiable instrument to the person who owns it at the time of payment, or to an agent of such owner

actually authorized to receive payment. No payment to any other person can be effective unless made in reliance upon actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other person to receive such particular payment, as to estop the owner from denying such authority.

3. Possession of a negotiable instrument is generally the sole adequate evidence of *apparent* authority to collect upon which the debtor can, without negligence, rely.

4. Plaintiff, assignee of a negotiable note secured by mortgage, continuously retained the instruments in her possession, but from time to time delivered to the original mortgagee the interest coupons. The assignment was never recorded, and the mortgagor continued to pay the interest to the mortgagee, and, after an extension of time of payment, also paid part of the principal to him. In the transaction of extension of payment plaintiff knew that the mortgagee assumed to act for her, but failed to protest her ownership to the mortgagor. All these transactions were without knowledge by mortgagor of any facts warranting the belief that the note had been transferred, and were upon the supposition that the original mortgagee still owned it. The interest payments were regularly remitted to plaintiff, but the payments of principal were converted by the mortgagee, who absconded, insolvent. Plaintiff brought action of foreclosure for the full amount, to which defense of such payments of principal was set up. *Held:*

   (1) Such payments were not binding on the plaintiff.

   (2) Even if plaintiff's silence at the time payment was extended might have confirmed the mortgagor in the belief that the mortgagee then owned the securities, she was not estopped to deny such ownership at any subsequent time.

5. Estoppel arises only when a person may reasonably anticipate a change of position by another in reliance on the former's act, and the former is not required to anticipate negligence or ignorance of the law in others.

6. A married woman joined with her husband in a negotiable note secured by mortgage, in part on her separate estate, and in part on that of her husband, the money promised to be repaid being borrowed for and used by the husband in his business. *Held*, on foreclosure of the mortgage, that plaintiff was not entitled to a personal judgment against the wife for any deficiency that might arise upon a sale of the mortgaged premises.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

On August 19, 1898, John Fremder, husband of the respondent, borrowed of Henry Herman $4,000 for use in his business of a boot and shoe dealer, of which no part came to the private use of the respondent or was for the benefit of her separate property. On the same date the husband and wife executed a note in the same form as that described in *Thorp v. Mindeman, ante,* p. 149, 101 N. W. 417, payable in three years, with six per cent. semiannual interest, and also executed a single mortgage upon two parcels of real estate, one of which belonged to the respondent and the other to her husband; said mortgage being in substantially the same form as that described in the above-mentioned case, which was duly recorded. On September 6, 1898, the note and mortgage were transferred to this plaintiff under her then name of Sanderson, and to her sister, Sarah Sanderson, who, on April 16, 1903, assigned her interest to the plaintiff. Neither of said assignments was recorded until about April, 1903. Continuously subsequent to the first transfer of said note and mortgage the papers remained in the possession of the assignees, and were never in the possession of Henry Herman. The mortgagors paid interest regularly to Henry Herman, receiving from him the interest coupons which had been attached to the note. On August 19, 1901—being the original maturity of the note—the mortgagors signed an extension agreement for an additional three years, which recited the extension as a consideration, and made no reference to the ownership, except it declared that the mortgagors, John and *Augusta Fremder,* agreed "to and with Herman to pay interest thereon at the rate of five per cent. thenceforth." Additional interest coupons were affixed to this extension agreement, which was, shortly after its execution, delivered to the plaintiff, and retained by her. Interest continued to be paid as before until February 18, 1902, when the defendant, her husband having died, paid to Herman $2,200 to apply upon the principal, and on the 11th day of April, 1902, made an additional payment

of $900. These payments were made with no knowledge of any facts warranting the belief that the note had been transferred, and upon the supposition that Herman still owned them. They were receipted for by Herman, but, unlike the previous interest, were not paid over to the owners of the mortgage, to whom thereafter he periodically remitted interest on the whole amount of the mortgage, receiving from the defendant merely the interest on the remaining balance of $900. Later—but at what date is not disclosed—the defendant desired to pay the remaining $900, and demanded delivery of the note and mortgage, whereupon she was informed by Herman that he would have to get them from a man in New York. She thereupon refused to pay until the papers were ready for delivery. Some time early in 1903, at a date not definitely disclosed, Herman absconded, insolvent, whereupon plaintiff placed her assignment of this mortgage on record, and notified defendant to pay only to her. In August, 1903, upon the maturity of an instalment of interest, defendant tendered $22.50, the interest on $900, which plaintiff refused to accept, demanding $100 as the semiannual interest on $4,000. Thereupon suit was commenced to foreclose the mortgage; also praying for deficiency judgment against defendant, claiming full amount of $4,000 to be due. The findings are substantially in accord with the facts above stated, from which the superior court concluded, as appears by an opinion filed, that the note in question was nonnegotiable; that the defendant was without fault or negligence in paying to Herman on the supposition that he was the owner, and that plaintiff had estopped herself from denying Herman's ownership, and hence that no more than $900 was due; and that no default in payment of interest had occurred; whereupon he rendered judgment dismissing complaint, from which the plaintiff appeals.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *Charles S. Carter.*

John Toohey, for the respondent.

DODGE, J. When one enjoying the confidence of the community in which he has acted as intermediary between investors and borrowers of money proves to have been both dishonest and insolvent, complications arise of the most serious character, in which the attempt to do justice must, of necessity, be painful to the courts; for, whatever the result, one party or the other—and often both—must suffer injury; sometimes ruin. The strain upon the human sympathies is frequently such as to render difficult adherence to settled rules of law, which, in individual cases, may seem to cast the burden of the wrong on him who can least well bear it. Such rules, however, become established upon many and varied considerations as likely, in the long run, to approximate most nearly to justice, and to minimize the wrong as far as possible, and must be applied by a court until, if the desired results are not obtained, the lawmaking power shall readjust them. Within some six years past this court has confronted various entanglements arising out of two notable instances of abuse of confidence generically like that of Henry Herman now presented, and has, with much anxiety of research, ascertained and sought to clearly declare certain of the rules which must govern the rights of the sufferers. We cannot forbear expression of our disappointment that counsel in this case have seemingly wholly failed to discover or avail themselves of those efforts in performance of their duty to aid both the trial court and this in administering justice.

Discussion of the negotiability of the note in suit may be dispensed with in this opinion, for that is considered and settled in *Thorp v. Mindeman, ante,* p. 149, 101 N. W. 417. Such negotiability being established, there results the rule that the debtor's duty is to pay to the person who owns the note at the time of payment, or to an agent of such owner actually authorized to receive payment; that no payment to any other person can be of any effect unless made in reliance upon the actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other

person to receive such particular payment as to estop the owner from denying such authority. Possession of a negotiable instrument is generally the sole adequate evidence of *apparent* authority to collect upon which the debtor has any right to rely, or can, without negligence, do so. *Fred Miller B. Co. v. Manasse,* 99 Wis. 99, 74 N. W. 535; *Winkelmann v. Brickert,* 102 Wis. 50, 78 N. W. 164; *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801; *Kohl v. Beach,* 107 Wis. 409, 83 N. W. 657; *Spence v. Pieper,* 107 Wis. 453, 83 N. W. 660; *Boyle v. Lybrand,* 113 Wis. 79, 88 N. W. 904; *Joy v. Vance,* 104 Mich. 97, 62 N. W. 140; *Biggerstaff v. Marston,* 161 Mass. 101, 36 N. E. 785; *Hollinshead v. Stuart,* 8 N. D. 35, 77 N. W. 89. Of course, there may be subsequent ratification, of which, however, nothing is claimed in this case. *Platt v. Schmitt,* 117 Wis. 489, 94 N. W. 345. This rule has been held sufficient to deny efficacy to such acts as permitting collection of interest, or even prior instalments of principal, which, in relation to other business not involving collection of negotiable paper, might well suffice to establish apparent agency. Commercial paper has always been favored in the law, not less for the ultimate benefit of the giver than of the holder, and the rule just referred to is in line with that policy. It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper distinctively from other property by the very dominant purpose of easy and probable transfer at any moment, so that what may be true as to ownership of such paper on one day is likely to have changed on the next. Of the probability of such change the negotiability of the instrument is a continual warning.

The last consideration is conclusive against the estoppel

sought to be raised against plaintiff as a result of her failure to protest her ownership, when, in August, 1901, she gained knowledge that Herman, in taking the extension agreement, had, in effect, assumed to act as the owner of the note and mortgage. Conceding for the moment that her silence might have confirmed defendant in the belief that Herman then owned the security, no estoppel could result to deny his ownership at any subsequent time, for the debtors had no right to assume that ownership of a negotiable note would continue; nor, as shown by the above authorities, could they, without negligence, act on such assumption. Estoppel arises only when a person may reasonably anticipate, or, as is sometimes said, intends, a change of position by another in reliance on the former's act. *Kingman v. Graham,* 51 Wis. 232, 242, 248, 8 N. W. 181; *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 332, 78 N. W. 440. One is not required to anticipate negligence nor ignorance of the law in others in so governing his conduct as not to mislead them to their hurt. Long prior to 1901 the law was well settled that one indebted on negotiable paper had no right to pay to any one not in possession of the instrument. Why, then, should the plaintiff anticipate that the debtor would forego that care? Certainly not. She exercised the very precaution against any collection of principal which the law required, by retaining possession of the principal note while she put Herman in position to bind her in receiving interest by delivering into his custody the coupons as they matured. Further, the conduct of defendant strongly negatives reliance by her on any mere silence of plaintiff, for when she came to make final payment she demanded presentation of the note, and, in its absence, refused payment. Had she exercised that same care on the other occasions which she herself deemed proper on the last, she would have been safe.

We can find nothing to remove this case from the carefully considered rule of the above authorities, nor to avoid the con-

clusion that between these two innocent persons the negligence of defendant in paying to one not having possession is so responsible for the loss that it cannot be imposed on the plaintiff, who at all times guarded against such result by keeping the note in her own possession. It is the former, and not the latter, who trusted Herman so as to enable him to do the wrong.

The conclusion thus reached in favor of the plaintiff's right to maintain action of foreclosure necessitates consideration of the very slightly argued question as to the personal liability of this defendant. It will be observed that upon the undisputed evidence and the findings the money promised to be repaid by the note was borrowed, to the knowledge of all parties, for the use of defendant's husband in his own business. It was not borrowed by her, and did not in any respect come to her private or separate use, nor was it borrowed with any purpose or understanding that it was to be used with reference to her separate estate, nor was it so used. While, of course, under her statutory power to contract with reference to her separate estate, she could make a perfectly valid mortgage thereon to secure this or any other debt, she could not bind herself to a legal liability by the mere promise to pay. *Gaynor v. Blewett,* 86 Wis. 399, 57 N. W. 44; *Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297; *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568; *Ritter v. Bruss,* 116 Wis. 55, 92 N. W. 361. The conclusion, therefore, is irresistible that she is under no such liability for the indebtedness represented by this note, and the plaintiff is not entitled to any personal judgment against her for any deficiency that may arise upon a sale of the mortgaged premises.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the plaintiff in accordance with law.

ELLIS, Appellant, vs. HOF and another, Respondents.

October 20—November 15, 1904.

Signatures: Forgery: Burden of proof: Statutes.

1. In an action of foreclosure based on a note and mortgage,—where the defendant has in his verified answer denied their execution, and alleged that the instruments are forgeries and not signed by him,—under sec. 4192, Stats. 1898 (providing that every written instrument purporting to have been signed or executed by any person shall be proof that it was so executed, until the person by whom it purports to have been so signed or executed shall specifically deny the signature or execution of the same by his oath, or affidavit, or by his pleading duly verified), the burden of proof is on the plaintiff to prove the signature.
2. In an action of foreclosure based on a note and mortgage, alleged to be forgeries, the evidence is *held* to support a finding that the signatures affixed were not the genuine signatures of defendant.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was commenced June 4, 1903, to foreclose a note and mortgage purporting to have been executed by the defendant *Hof* November 19, 1897, to the defendant Henry Herman, for $6,500, to become due three years from that date, with interest at six per cent. payable semi-annually, and secured by mortgage upon the lands described, which mortgage was recorded November 22, 1897. The complaint alleges that May 3, 1902, Henry Herman assigned the note and mortgage to the plaintiff as collateral security to a note given on that date by Henry Herman to the plaintiff for $3,050, payable on demand, and that no part thereof had been paid, and that such assignment was recorded April 17, 1903. The complaint further alleges that the defendant *Farwell Investment Company* has a lien by way of mortgage on one of the lots described prior to the plaintiff's mortgage, the amount of which should be determined so as to enable the

plaintiff to redeem therefrom; but the complaint asks no personal judgment against the company. The defendant *J. J. Hof,* by way of verified answer denied that he executed the note and mortgage set out in the complaint, or either of them, and alleges that, after having seen such pretended note and mortgage, he avers that the signatures *"J. J. Hof"* to the said note and mortgage are forgeries; that he never signed them, or either of them; and that he never saw either of them until the same were exhibited to him June 8, 1903; and that he had no knowledge of the existence of either of them, or any information concerning the same, until in May, 1903, when he first learned thereof from inquiries made by the plaintiff's attorneys. A trial being had, the court found at the close thereof: (1) That February 2, 1897, Herman caused a sheriff's deed of all the lands described in the complaint to be given to said *J. J. Hof,* and that the same was duly recorded; that Herman also caused all of said premises to be apparently conveyed to *J. J. Hof* by warranty deed from Markey and wife, July 17, 1897, which deed was recorded January 3, 1898. (2) That such conveyances were so made to *J. J. Hof* for the sole use and benefit of Herman, and *Hof* had no interest therein whatever. (3) That May 3, 1902, Herman borrowed of the plaintiff $3,050, and gave to the plaintiff therefor his note for that amount, due in sixty days from that date, with interest at six per cent., and to secure such loan of $3,050, Herman having the $6,500 note and mortgage in his possession at the time, did on the date named assign the same to the plaintiff as collateral security for the payment of the note of $3,050 mentioned, and such assignment was recorded as stated, and that no part of the $6,500 note had been paid, and that there was due on the note of $3,050 the sum of $3,337.25. (4) That by the terms of the $6,500 note it became due as stated. (5) That *J. J. Hof* upon the trial disclaimed any ownership in any of the premises. (6) That the *Farwell Investment Company* had

a first mortgage lien upon one of the lots described for $7,348.49, with interest from December 3, 1903, for which it was entitled to judgment of foreclosure and sale against all of the other parties. (7) That the plaintiff had a first lien by way of mortgage upon the other premises described. (8) That $350 was a reasonable solicitor's fee therein, and should be allowed to the plaintiff upon the foreclosure of his mortgage; that *lis pendens* was duly filed June 26, 1903. (9) That the signature of *J. J. Hof* affixed to the note and mortgage of $6,500 was not the genuine signature of *J. J. Hof,* but was a forgery; that *J. J. Hof* never executed that note and mortgage, or either of them; that he never authorized any person to execute the same, or either of them, for him, and he had no knowledge of the existence of the Marker deed, mentioned, or the note and mortgage, or either of them, until April, 1903; that *Hof* never received any consideration for such note and mortgage, and never ratified the execution of said deed or note or mortgage, and promptly disavowed the same as soon as he learned of their existence. As conclusions of law the court found, in effect: (1) That *J. J. Hof* was entitled to judgment dismissing the complaint as to him, and to have and recover his costs and disbursements, to be taxed and allowed and entered in the judgment; (2) that the note and mortgage of $6,500 created a mortgage lien upon the premises described, of which Henry Herman was the equitable owner (subject to the rights and lien of the *Farwell Investment Company,* as found), for $3,050, with interest at six per cent. from May 3, 1902; (3) that the plaintiff was entitled to judgment of foreclosure and sale (except as against *J. J. Hof*) unless the $3,337.25, with interest, should be paid before the expiration of the year, as therein stated. Judgment was thereupon entered therein according to such findings. The plaintiff appeals from so much of the judgment as ordered and adjudged that the complaint be dismissed as to the defendant *J. J. Hof,* and that *J. J. Hof*

have and recover judgment against the plaintiff for $100.56, the amount of his costs and disbursements in the action.

For the appellant there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

For the respondents there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *F. M. Hoyt.*

CASSODAY, C. J. The statute declares:

"Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the person by whom it purports to have been so signed or executed shall *specifically* deny the signature or execution of the same by his oath or affidavit *or by his pleading duly verified.*" Sec. 4192, Stats. 1898.

This court has repeatedly held that this section only "dispenses with proof of the signature to a written instrument until the person by whom it purports to have been signed shall specifically deny the signature of the same by his oath or affidavit *or by his pleading duly verified. Wallis v. White,* 58 Wis. 26, 15 N. W. 767; *Nielson v. Schuckman,* 53 Wis. 638, 11 N. W. 44. Here the answer of the defendant *J. J. Hof,* duly verified, expressly denies that he ever executed the note or the mortgage, and avers that the signatures of "*J. J. Hof*" to said note and mortgage were forgeries, and that he never signed the said note or mortgage, or either of them, and never saw either of them until they were exhibited to him by the plaintiff's attorneys four days after the commencement of this action. "In such a case," as said by Chief Justice COLE, speaking for this court, "the statute imposes upon the party claiming the note to be valid the burden of proving the signature, and that the note is a binding obligation as against the party resisting the payment thereof." *Thomas Ludlow & Rodgers v. Berry,* 62 Wis. 78, 80, 22 N. W. 140; *Finlay v. Prescott,* 104 Wis. 614, 618, 80 N. W. 930. Nevertheless, counsel for the plaintiff contend that the burden was on the defendant *Hof* to prove that his sig-

natures were forgeries by clear, convincing, and satisfactory evidence, and beyond all reasonable controversy. In support of such contention counsel cite cases in this court where the signatures were genuine, and where no attempt was made, or, if made, there was a failure to bring the case within the provisions of the statute quoted. The question is important here only as meeting the contention of counsel, since the defendant *Hof* assumed the burden of proving that his signature to the note and mortgage were forgeries; and, as indicated in the statements of facts, the trial court found in his favor; and, as we read the record, such findings are sustained by clear, convincing, and satisfactory evidence, and beyond all controversy. The general nature of the evidence may be briefly stated. The note and mortgage purport to have been made in Milwaukee November 19, 1897. The notary public was the confidential clerk of Henry Herman, and had been for years. He left Milwaukee soon after Herman absconded, and removed to Oklahoma. He testified that he thought the signature was *Hof's,* but he had no recollection of the execution of the mortgage in suit, except that his signature appears on it. He admits that he had certified to acknowledgements without the parties being before him, and that it was a common thing in Herman's office in 1900; but that he never did so in 1897. The other subscribing witness testified that he had no recollection of witnessing the instrument, and could not say that *Hof* signed it in his presence; that, if Herman showed him the signature and asked him to sign as a witness, he would have done so, without *Hof* being present, if he believed it to be *Hof's* signature, as he did. At the time of executing the note and mortgage, *Hof* resided at Sobieske, in Oconto county, and had for the two years immediately preceding, and has ever since. For some years prior to 1895 he had resided in Milwaukee, and had business relations with Henry Herman. The signatures were denied by *Hof* in the most positive manner. His letter book and his memorandum

book furnished written evidence as to his whereabouts during almost every day in the month of November, 1897. They show that he was at his home in Sobieske on the day the note and mortgage purport to have been executed in Milwaukee; that on that day he wrote a letter from Sobieske to Milwaukee; that he was in Sobieske during the whole of the week before and for more than a week afterwards. *Hof* took his meals at a hotel in Sobieske on the 19th, 20th, 21st, and 22d of November, 1897, and the keeper of the hotel and his wife testified that *Hof* was there on each of those days; and they are corroborated by entries in their account book of charges against him for such board. Other witnesses testified to business transactions with him in Sobieske on November 19 and 20, 1897. Six experts testified that the signatures "*J. J. Hof*" on the note and mortgage, in their opinion, were not made by *Hof*. Some of them had long been acquainted with his handwriting, and one, especially skilled in such matters, after comparing such signatures with those admitted to be genuine and from enlarged photographs thereof, in evidence, states thirteen several differences between the genuine and the forged. Such differences are apparent upon close inspection. We must hold that the findings are amply supported by the evidence.

2. Counsel further contend that, if *Hof* did not execute the note and mortgage, he adopted, ratified, and confirmed their execution. It is enough to say that we find no evidence in the record that would justify a finding that *Hof* was estopped by conduct from denying the signatures. On the contrary, all his conduct is the other way.

By the Court.—The judgment of the circuit court is affirmed.

SEGALL, Appellant, vs. PADLASKY, Respondent.

October 20—November 15, 1904.

Master and servant: Negligence: Personal injuries: Trial: Court and jury: Proximate cause.

In an action for negligence for personal injuries to a servant from working with his bare hands and arms in a vat of fur dye, after the master had told him that it was not dangerous, the evidence, stated in the opinion, is *held* to be sufficient to require the submission to the jury of the questions of negligence and proximate cause.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries. The plaintiff is a common laborer, and the defendant the owner of an establishment for cleaning hides and dyeing furs in the city of Milwaukee. It appeared by the plaintiff's testimony that on the 11th day of June, 1902, he commenced work for the defendant at his dyeing establishment, and that on the 12th of June he was set at work stirring furs in the dye vats with his hands and bare arms; that the dye was a dark liquid, and that he asked the defendant before commencing work whether it was dangerous, and the defendant said it was not; that another workman who was assisting him had rubber gloves upon his hands and arms, and the plaintiff asked for a pair of gloves, and the defendant said it was not necessary—that the other workman did not want to soil his hands, and that was the only reason why he wore gloves; that he continued stirring furs in the vats with his hands and arms immersed in the dye all that day and the following day, at which time his hands and arms became swelled, and, on the morning following the second day, became very painful, with large blisters and caused the plaintiff great pain for several weeks; that upon the morning following the second day of his labor he consulted a doctor, who

treated his injuries for about three weeks. The physician who treated the plaintiff testified that, in his judgment, the injuries resulted from the immersion of the hands and arms in a strong acid. At the conclusion of the physician's evidence the plaintiff rested, and a nonsuit was granted on the ground that there was neither evidence of negligence on the part of the defendant, nor that defendant's negligence was the proximate cause of the injury. From this judgment the plaintiff appeals.

For the appellant there was a brief by *W. B. Rubin,* attorney, and *Moritz Wittig,* of counsel, and oral argument by *Mr. Rubin.*

For the respondent there was a brief by *McCabe & Dahlman,* and oral argument by *M. A. McCabe.*

WINSLOW, J. There was certainly sufficient evidence of defendant's negligence to take the question to the jury. According to the evidence, he set the plaintiff at a job where his arms would be immersed all day in a liquid dye. When asked whether it was not dangerous, he assured the plaintiff it was not, and upon this assurance the plaintiff went to work. After two days of this work the plaintiff's arms and hands swelled and blistered so as to be very painful. Before dipping his arms in anything else, he consulted a physician. The physician, after applying litmus paper to the arm, testifies that the injuries were evidently the result of immersion in some liquid containing a strong acid. Here certainly was evidence enough of negligence to take the question to the jury. The jury would be justified in finding that the dye contained a strong acid which was injurious to the human skin. If the defendant knew that it contained such an injurious acid, then the jury would be justified in finding defendant negligent, if he assured the plaintiff that it was harmless. If he did not know its composition, the jury would also be justified in finding negligence, if he made such

an assurance, because he assumed to know, and must abide the consequences to the same extent as if he did know when an innocent third person has been misled. So in either event there is proof of negligence to go to the jury, and, in view of the positive testimony of the physician as to the cause of the swelling of the plaintiff's arms, it is very clear that the question whether such negligence, if found, was the proximate cause of the injury, is also one for the jury.

By the Court.—Judgment reversed and action remanded for a new trial.

CARPENTER, County Judge, Respondent, vs. THE UNITED STATES FIDELITY & GUARANTY COMPANY, imp., Appellant.

October 20—November 15, 1904.

Executors and administrators: Attorney's services: Lien on assets: County courts: Jurisdiction: Collateral attack.

1. Under sec. 2443, Stats. 1898, extending the juridiction of county courts to all matters relating to the settlement of the estate of such deceased persons, who, at the time of death, were inhabitants or residents of the county where the court is located etc., such courts have jurisdiction to determine the amount justly allowable to the attorneys of the administrator out of the estate on account of legal services performed by them, to make the same a lien on the assets thereof, and to order the lien extinguished by using funds for which the administrator is responsible.
2. The court having exercised its jurisdiction in the respect last noted, its decision cannot be disturbed in an action against the sureties on the bond of a defaulting administrator.
3. Where an administrator's account has been duly settled, including an adjudication of the amount due his attorneys for services and disbursements, and final order entered requiring the payment direct to the attorneys of the sum so awarded them, such final order is conclusive in an action brought in the name of the county judge upon the administrator's bond against the sureties.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action on an administrator's bond. The issues raised by the pleadings sufficiently appear by inference from the findings of fact, of which the following is a brief summary:

(1) November 25, 1897, Charles W. Stolla, residing in Milwaukee county, died testate. Such proceedings were duly taken that Arthur M. Kuehn March 8, 1898, was appointed administrator of his estate with the will annexed. He duly qualified as such administrator, entered upon his duties as such and continued in office until the findings herein were filed.

(2) The penal sum in said Kuehn's bond was $51,000, and the surety was the defendant, *The United States Fidelity & Guaranty Company.*

(3) It was provided in such bond, among other things, that if the said Kuehn performed all orders and judgments of said county court it should be void, and otherwise that it should remain in full force and virtue.

(4) February 9, 1903, the administrator rendered an account of his administration, showing receipt of $34,398.07, in money and personal property, disbursements of $26,338.60, and a balance on hand of $7,259.47, in money and a note for $400.

(5) B. K. Miller, George H. Noyes and George P. Miller, as firm of Miller, Noyes & Miller, were the administrator's attorneys until they filed their petition, hereafter mentioned. Otto J. Fiebing and Henry J. Killilea, as firm of Fiebing & Killilea, were likewise his attorneys until they filed their petition, hereafter referred to.

(6) Miller, Noyes & Miller after the filing of said account by petition informed the court that though by such account it appeared that they had received from the estate $4,000, as compensation for legal services, and $1,773.49, for disbursements, no such payment had been made, and requested

payment of such sums out of the assets shown to be in the administrator's hands.

(7) Fiebing & Killilea by petition informed the court that, whereas by said account no credit was taken by the administrator for payments to them, they rendered services to him, which were beneficial to said estate, of the reasonable value of $250, for which they had not been paid. They further informed the court that the administrator was insolvent. They requested that the sum clamed by them might be ordered paid out of the assets of the estate.

(8) Upon due notice to all the parties interested as heirs the petitions were heard before the county judge. It was there made to appear that the facts stated therein were true; that the services rendered by the attorneys were reasonably worth the sums charged by them; that such services were actually rendered for the benefit of the estate; that $1,773.49 were actually disbursed for its benefit by Miller, Noyes & Miller; and that the administrator was insolvent and had appropriated to his own use all the personal property of the estate, except $70.59.

(9) Thereupon payment by the administrator out of money due from him to the estate was ordered of $5,773.49, to Miller, Noyes & Miller, and $250, to Fiebing & Killilea, and said sums were decreed to be liens upon the assets of the estate.

(10) Such proceedings were subsequently duly taken that the administrator's account was settled and a final order of distribution was entered in respect thereto. The sum of $14,778.69 was decreed to be due from the administrator, and he was ordered to pay therefrom the sums allowed to the attorneys as aforesaid, and the balance to the heirs entitled thereto, specifying the amount going to each.

(11) Such heirs consented to the entry of the order.

(12) It was not appealed from, or set aside or vacated.

(13) After the entry thereof due demand was made upon

the administrator to comply therewith, but he refused to do so, except as to the payment of $70.59.

(14) Thereafter due demand was made upon the defendant surety to respond in the sum found due from the administrator, and it refused to do so.

(15) April 17, 1903, thereafter, said county court upon petition of one of such heirs authorized suit upon the aforesaid bond to recover the amount so found due from the administrator for the benefit of the parties entitled thereto.

(16) This action was commenced accordingly and thereafter the surety paid such parties, except said attorneys, Miller, Noyes & Miller and Fiebing & Killilea.

(17) There is due plaintiff from said administrator and said surety for the benefit of said attorneys the sums ordered paid to them, as aforesaid, with interest from April 15, 1903.

(18) The sums ordered paid measure the reasonable value to the estate of the service rendered thereto by the attorneys.

Thereon it was held that plaintiff was entitled to judgment for the sums so ordered paid to the attorneys, with interest, for their benefit, with costs and disbursements. Judgment was entered accordingly.

Exceptions were filed to the findings, which need not be stated in detail. The defendant surety company appealed.

For the appellant there were briefs by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Francis Bloodgood,* of counsel, and oral argument by *J. B. Kemper.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. P. Miller.*

MARSHALL, J. The first question to be noticed is: Did the county court have jurisdiction to determine the amount justly allowable to the attorneys of the administrator out of the estate on account of legal services performed by them, to make the same a lien thereon and to order the lien to be extinguished by using funds for which the administrator was responsible?

True, as counsel for appellant contend, the legal title to the personal property of a deceased person is vested in his personal representative, and that expenses incurred by him in the performance of his duties are not necessarily a charge thereon, and are in all cases personal liabilities of such representative. *Miller v. Tracy,* 86 Wis. 330, 56 N. W. 866. But it is not the law, as understood here, that the court appointing an administrator has no control over property in his hands during the course of administration, except to require the filing of an inventory, to adjudge upon claims of the deceased, to require the filing of the administrator's account, to order the payment of debts and adjudge the payment of legacies and distribute property according to the law of descent and heirship or the will, if there be one;—that there is no supervisory power over the estate during the period of administration. One should not be misled as to the jurisdiction of our county courts in the settlement of estates by authorities found elsewhere under a different system than ours.

Where the legal title to personal property belonging to an estate upon the appointment of the administrator and his qualification, vests in him, he holds the same in trust and is accountable to the court appointing him after the manner of trustees generally. He is the "arm of the court," so to speak, in the settlement of the estate, the same as a receiver is in an ordinary administration suit. The court has the amplest authority, within the limitations of the statute, to direct him, and to recognize equitable claims upon the funds in his hands, growing out of services performed in the conservation thereof, and to protect the possessor of such claims, if justice so requires, by making them liens upon such funds, after the manner of courts of equity, in administering property in the hands of its agents.

By sec. 2443, Stats. 1898, the county court's jurisdiction is expressly extended "to all matters relating to the settlement of the estate of such deceased persons" at the time the deceased was an inhabitant or resident of the county where the

court is located, having jurisdiction of the matter, or left property within such county to be administered. That broad general power necessarily carries with it by implication all judicial authority of courts of equity in the administration of trusts necessary to the proper administration of the particular class of trusts in question, and that has been the uniform holding of this court.

"The county courts have plenary jurisdiction in all matters of the administration, settlement and distribution of the estates of deceased persons, and much of this jurisdiction is of an equitable character and is necessarily concurrent with that of courts of equity." *Tryon v. Farnsworth,* 30 Wis. 577, 581.

The power of the court includes "all jurisdiction, both legal and equitable, unless expressly reserved, necessary to the due administration of the estates of deceased persons and to the performance of all acts required in the course of such administration. . . . It may grant equitable relief or enforce a trust in a case of this nature, the same as a court of equity; and although the jurisdiction of a court of equity still exists, it does not oust that of the county court in a proper case. The doctrine of equitable estoppel may be recognized, and its principles enforced, as well by the county court as by the court of chancery, the jurisdiction of the latter being concurrent, merely, in any matter pertaining to the settlement of the estates of deceased persons." *Brook v. Chappell,* 34 Wis. 405, 411.

That doctrine will be found often referred to in our reports. The settlement of estates so far at least as relates to trust-fund features is within the inherent jurisdiction of courts of chancery as a part of their general jurisdiction in the administration of trusts. Substantially all authority so possessed by such courts is now likewise possessed by our county courts.

With the foregoing in mind, by reference to the authorities in respect to the power of courts of equity dealing with judi-

cial trustees generally, we may easily determine the measure of the authority of our county courts in dealing with the questions under consideration. We apprehend that time need not be spent demonstrating that a trustee in a judicial administration in equity may not only be permitted to pay out of the trust fund any legitimate expense incurred in the conservation thereof, but may be, when necessary to the ends of justice, required to do so, and when so justly required that the adjudged expense may be made by order of the court a lien upon such fund, and provision be made for its enforcement. There is no more legitimate expense that such a trustee can incur than that for legal service, which is reasonably necessary to the safety of the fund, and none more commonly required, upon a proper application, to be paid out of the trust fund. True, the attorney in such a case has no lien thereon until the court gives him aid in the matter. His claim is purely personal to the trustee. The rule in that regard is not peculiar to the class of trusts we have here. It is a general rule applicable to all trusts. Every attorney who performs beneficial services to a trust, directly or in effect enriching the trust fund, when it is necessary for his protection, is equitably entitled to obtain a lien upon the trust fund. The court has ample authority to recognize and give effect thereto. The manner of acquiring such a lien is for the claimant to petition the court to determine the amount he should have out of such fund, considering the character of his services and the real benefits accruing to the trust therefrom, and to adjudge the same to be a charge thereon. There are many cases that might be referred to where it has been held that it is proper to make an allowance for such services direct to the attorney instead of making it in form as an allowance to the trustee. *Central R. & B. Co. v. Pettus,* 113 U. S. 116, 124, 5 Sup. Ct. 387. Justice HARLAN in that case said: "When an allowance to the complainant is proper on account of solicitors' fees, it may be made direct to the solicitors themselves, without any

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subject to variance by the mere direction which the county court saw fit, acting within its jurisdiction, to give to the fund or any part thereof.

By the Court.—Judgment affirmed.

PATTON and others, Appellants, vs. PATRICK, Trustee, Respondent.

October 20—November 15, 1904.

Trusts and trustees: Active trusts: Wills: Rights of beneficiary to terminate trust: Assignment of income.

1. Unless so completely thwarted by rules of law as to accomplish no possible purpose, it is the duty of courts to enforce the right of an owner of property to control its use and management after his death, as by directing that specific real estate be preserved as such within a limited time, and the income paid to beneficiaries.
2. In the progress of the settlement of an estate, wherein the will of the testator provided that the income of specific real estate should be collected by trustees and paid to his children at stated intervals, and that such real estate should not be sold until the happening of certain events, or a fixed period of time, and then to be converted and divided, it was adjudged that the children became vested with their respective shares of the estate immediately upon the testator's death. *Held*, under sec. 2089, Stats. 1898 (providing that no person beneficially interested in a trust for the receipt of rents and profits of land can assign or dispose of said interest), that the children could not by transferring their vested rights in the remainders, together with their shares in the income, render impossible the purpose of the testator, and present a situation where the continuance of the trust could be terminated.
3. In such case, where, by reason of the peculiar situation of the land—leased by the testator before his death for a long term to those who had constructed buildings thereon, and who were also charged with the duty of paying the taxes—there remains but the single act of enforcing performance by the lessees

of their duty to pay rent and taxes, the trust is, nevertheless, not an executed one, and is valid by virtue of the active duties imposed upon the trustee to receive rents and apply them to the use of the children.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

By the will of Harrison Ludington, so far as material to the present case, he vested in his executors, as trustees, a large estate, of something over a million dollars, consisting about equally of real and personal property; the bulk to be held in trust and managed during the life of his widow, and from the proceeds certain sums to be paid her, and the rest of the income to be paid annually to his several children, and at the end of the termination of the trust the said property, or its proceeds, to be divided amongst said children. With reference, however, to two parcels of real estate in the city of Milwaukee, included in such trust, he provided:

"My said executors and trustees shall not have the power or authority to sell or convey, except by way of mortgage for the purpose of rebuilding [said defined real estate], during the lives of my said wife and of my youngest child surviving at my death; but shall receive the rents, issues and profits thereof and distribute and divide the income thereof as hereinbefore provided with respect to the general income of my estate. . . . If my said wife and my said youngest child surviving at my death, or either of them, shall survive the first day of April, A. D. 1908, then and in such case my said executors and trustees and their successors in trust are authorized and empowered to sell and convey said premises or any of them and convert said property into money."

The will has been construed as conferring vested interests upon several children. *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073. The widow elected to repudiate the provision made for her by the will, and has received her share under the statute, including a charge upon the income of the above-mentioned specific parcels of real estate for one third thereof

during her life; such income amounting to about $17,000 per annum. The trustees named in the will have both died, and the present trustee, *Patrick,* has been appointed by the court, and is now the sole surviving trustee. This action was brought to adjudge a termination of the trust, and require a distribution of the entire assets ratably among the children and the heir of the only deceased child; all of said beneficiaries consenting to and requesting such termination, and the trustee expressing the opinion that the same would generally enhance the value of said assets, but leaving the court to say whether he could lawfully consent to such termination. Since the action was commenced, and since judgment in the circuit court, the widow has died, thus terminating the trust, except so far as it applies to said specific parcels of real estate; and both parties request that we consider the question in the light of that situation, and that the action be deemed one merely to declare terminated the trust with reference to the said two parcels of real estate, and to require their immediate transfer in specie, to the plaintiffs in common—one-sixth to each. The circuit court, upon the facts, which are not in dispute, entered judgment denying the prayer of the complaint, from which the plaintiffs bring this appeal.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Charles Quarles,* of counsel, and oral argument by *Charles Quarles.* To the point that all parties interested being *sui juris,* and before the court and consenting, the trust not only may but should be terminated, they cited *Sumner v. Newton,* 64 Wis. 210; *Holmes v. Walter,* 118 Wis. 409; *Becker v. Chester,* 115 Wis. 90; *McWilliams v. Gough,* 116 Wis. 576; *Bowditch v. Andrew,* 8 Allen, 339; *Inches v. Hill,* 106 Mass. 575; *Sears v. Choate,* 146 Mass. 395, 398; *Taylor v. Huber,* 13 Ohio St. 288; *Lamberton v. Pereles,* 87 Wis. 449; *Williams v. Smith,* 117 Wis. 142; *Douglas v. Cruger,* 80 N. Y. 15, 19; *Cuthbert v. Cauvet,* 136 N. Y. 326; *Lent v. Howard,* 89 N. Y. 169.

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

DODGE, J. The rights of an owner of property to control its use and management during his life and after his death, within certain limitations imposed by law, are among the most sacred, and entitled to the most careful protection at the hands of courts, without scrutiny as to the quality of his reasons in making such choice. Among these rights is that of preserving specific real estate as such within a limited time after his death. He may think that thereby is assured either a more certain or a larger income than could be obtained by its sale and the investment of the proceeds, or he may believe that the increase in sale value during that term will be for the best interest of those for whom he desires to provide. The testator in the present instance has declared his choice and will that the two parcels of real estate in Milwaukee now under consideration shall continue to be held as such until the year 1908, unless his widow and youngest child both die before that time. Why he did so, we need not inquire. It was his right, and it is the duty of courts to enforce that choice, unless, indeed, it is so completely thwarted by other rules of law as to accomplish no possible purpose. It is said that is the case here, since we have already decided that, under Gov. Ludington's will, his six children became vested with their respective shares immediately upon his death. *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073. The result of this holding doubtless is that they can sell and transfer their vested rights to the remainders arising after the termination of the intermediate estates in the trustees. If, as is suggested, they might also effectively transfer their shares of the rents of this specific real estate during that interval, so that the transferee would, in effect, own the entire property, subject only to the right of the trustee to collect and pay over the

rents until 1908, a very persuasive situation would be presented for holding the continuance of the trust futile. But we deem it plain that they have not that right. Sec. 2089, Stats. 1898, provides that no person beneficially interested in a trust for the receipt of rents and profits of lands can assign or in any manner dispose of said interest. Now, whatever may be the holding as to the conversion of this or any other portions of the estate into personalty, for some purposes, by virtue of authority or duty in the trustees to sell and distribute the proceeds, we cannot doubt that a specific piece of land placed in the hands of trustes under an active trust to collect and distribute rents, and required to be retained by them for a certain period, is, during that period, "land" held under a trust for the receipt of rents and profits, within the meaning of that statute. Hence no assignment by the beneficiaries of their interest in those rents could be of any validity. The purpose of the testator, therefore, to preserve those rents as an annually recurring source of income to his children, is not rendered impossible by any power existing in them to transfer it to a purchaser of the remainder. We deem it our duty to protect that purpose by refusing to discharge the property from the trust.

We cannot agree with the insistence of appellants' counsel that this trust has become so executed as that, under the provisions of sec. 2093, Stats. 1898, the trust ceases. While, by reason of the peculiar situation of this land—leased as it was by the testator before his death for a long term to those who have constructed the only buildings thereon, and who, as we understand, are also charged with the duty of paying the taxes—there remains but the single act of enforcing performance by the lessees of their duties to pay rent and taxes, nevertheless that is sufficient to mark it as an active trust, under all the authorities. Sec. 2074, Stats. 1898; *Lamberton v. Pereles,* 87 Wis. 449, 58 N. W. 776; *Perkins v. Burlington L. & I. Co.* 112 Wis. 509, 518, 88 N. W. 648; *Holmes v.*

Walter, 118 Wis. 409, 416, 95 N. W. 380. So long as that duty remains, the trust is not an executed one, but is necessary to maintain the separateness of the intermediate equitable estate from the ultimate legal estate in remainder in either the property itself or its proceeds, and is valid by virtue of the active duties to receive rents and apply them to the use of the children imposed upon the trustees meanwhile. Secs. 2074, 2081, subd. 3, Stats. 1898.

We approve the conclusion reached originally by the county court, and affirmed by the circuit court, refusing to interfere with the terms of the testator's will in regard to these parcels of real estate.

By the Court.—Judgment affirmed.

In re Allis's Estate.

October 21—November 15, 1904.

Trusts and trustees: Investment of trust funds: Discretion of trustee: Trust companies: Statutes: Return to principal of premium paid for purchase of securities.

1. Except as modified by statute, trustees cannot be relieved from liability for the investment of trust funds in other than governmental or real-estate securities.
2. Ch. 317, Laws of 1903 (providing that every executor, guardian, or trustee, except where it is otherwise provided by the will or instrument of trust, if any, may invest trust funds in governmental or real-estate securities as provided by law, and also may, under the direction and with the approval of the proper court, invest trust funds as therein enumerated), is *held* to have been enacted in recognition of the law as declared by the supreme court, and that investments in securities, other than those specified in the act, do not come within the protection of the law.
3. Sec. 1791*h*, Stats. 1898, giving a trust company the right, in its discretion, to invest trust funds in certain specified securities, "or in such real or personal securities as they may deem proper," relates to the investment of the funds owned by

the trust company in its corporate capacity, and does not include money held by it in trust as executor, administrator, or any other trust relation.

4. Under a will giving trustees power "in their discretion to invest . . . and employ said real estate and generally manage the same, to continue the same as it is invested at the time of my death—and especially as invested in (a designated corporation), or to change such investments," and a finding by the trial court, that investments in securities other than those specified in ch. 317, Laws of 1903, "were such as an ordinarily prudent person would make, having regard to the permanence and security of the principal, as well as the production of an income for the beneficiaries under the will," it is *held* that the trustees in purchasing railway and street-railway bonds, acted within the authority and direction as expressed in such will, and that the court properly approved them.

5. Where in the investment of trust funds, the income of which is to be paid to beneficiaries during the life of the trust, the principal to be paid to others on its termination, the trustee bought securities at a premium, the trustee should take from the annual income such portion as will, under established rules and tables, repay the *corpus* of the estate the amount paid therefrom in purchasing the securities.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed in part, affirmed in part.*

Appeal from the judgment of the circuit court, entered May 14, 1904, which affirmed in part and reversed in part the decree of the county court of Milwaukee county entered in the proceeding instituted by the trustees under the will of Ernest Allis, deceased, allowing their annual account, disapproving of their investments, and approving their action in apportioning the annual income on the investments by setting aside a portion yearly to repay the *corpus* of the estate the premiums paid in the purchase of certain securities mentioned in their account. It appears the present trustees during the years 1900 and 1902 invested the greater portion of the fund in their charge in railroad and street railway bonds, paying a considerable sum as premium. It appears that the

investments, in a financial sense, are deemed to be good and safe, from the standpoint of a prudent and provident dealer in securities, as permanent and good interest-bearing investments. The will of the deceased, disposing of the estate, directs that the residuary estate shall be held by the trustees, who are empowered:

"To sell, mortgage, or lease said real estate; convey or exchange the same; convert the realty into personalty or personalty into realty; and so to do with any and all parts of said estate; granting to them full power and authority in their discretion to invest, reinvest and employ said real estate and generally manage the same; to continue the same as it is invested at the time of my death—and especially as invested in the E. P. Allis Company, or to change such investments; to receive and collect such profits and income thereof, and to dispose of the net income as follows."

Here follow the provisions directing the disposition of the income, and the payment thereof by the trustees, during the life of the trust, to the widow and child or children; and, in case of the widow's death under certain circumstances, a fixed sum is to be paid her mother during life. The only child of the deceased surviving him is a daughter about fourteen years of age, whose guardian *ad litem* prosecutes this appeal.

For the appellant, *Margaret W. Allis,* there was a brief by *Miller, Noyes & Miller,* attorneys for *Geo. H. Noyes,* guardian *ad litem,* and oral argument by *Geo. H. Noyes.*

For the respondent, *Penelope Winston Allis,* there was a brief by *Quarles, Spence & Quarles,* and *Charles Quarles,* of counsel, and oral argument by *Charles Quarles.* To the point that no sinking fund can be established if it appears that the purpose of the testator was primarily to protect the life tenant, they cited *McLouth v. Hunt,* 154 N. Y. 179–192; *In re Hoyt,* 160 N. Y. 607; *N. Y. Life Ins. & T. Co. v. Baker,* 165 N. Y. 484; *Hite's Devisees v. Hite's Executor,* 93 Ky. 257; *Hemenway v. Hemenway,* 134 Mass. 446; *N. E. Trust Co. v. Eaton,* 140 Mass. 532.

For the respondents *Milwaukee Trust Co.* and *John W. Barr, Jr.,* as trustees under the will, there was a brief by *Van Dyke & Van Dyke & Carter,* and oral argument by *G. D. Van Dyke.*

SIEBECKER, J. The trustees petitioned the county court to allow the account of their administration of the trust as stated, and to approve and ratify the investments made by them in railroad and street railway bonds, and asked to be authorized to continue these investments, and to make others of like character, if, in the execution of the trust, it was found expedient and promotive of the interests of the persons interested in the estate. The conflicting claims of the parties on the matters submitted by the petition necessitates a determination of the question whether the investments made and reported by the trustees are sanctioned by the law of this state.

The subject has many times been before the courts of this country and England in its various phases, and has occasioned much discussion of the question as to what securities trustees will be allowed to purchase under their obligation to protect the fund for those beneficially interested. Counsel for the respective parties on this appeal have presented an exhaustive and instructive review of the adjudications and the history of the law as it has been enforced in various jurisdictions. A full and well-considered discussion of it is presented in the case of *Lamar v. Micou,* 112 U. S. 452, 5 Sup. Ct. 221. We are asked by respondents to treat the question as an original proposition in this court, in view of these adjudications and the question actually before the court in the case of *Simmons v. Oliver,* 74 Wis. 633, 43 N. W. 561. In that case the trustee had invested a portion of the trust fund by loaning it to a manufacturing company, taking its indorsed promissory note, at a time when the company was in good financial standing, and the indorsers were reputed to be perfectly responsible and of ample means. The company and the indorsers, through

financial embarrassments, were unable to pay the note in full. which occasioned a loss of a part of the fund. The trustee asked that he be relieved from liability to make the loss good, upon the ground that he had acted in good faith, and considered the investment a prudent and safe one. In passing judgment on the case thus presented, the court states:

"We are disposed, on this subject, to follow the English rule, which has been adopted in some of our sister states, and hold that the trustee cannot invest trust funds in personal securities, and that it is not an exercise of sound discretion to so invest them."

This declaration is followed by an excerpt from the opinion in the case of *Ackerman v. Emott,* 4 Barb. 626, giving it as the English rule that a trustee can only protect himself against loss by investing the trust fund in real-estate or governmental securities. The court announced that counsel in the argument of that case, as in the instant case, urged that this rule so adopted "be changed to meet the conditions and needs of present business and methods of investment." After consideration of the reasons submitted, the court adds:

"If this rule shall be found inconvenient, or, on the whole, not best adapted to the new condition of things, or to the necessities of present business arrangements, the legislature can change it by authorizing the investment of trust funds in shares of stock, or on the credit of business corporations, or on the personal security of individuals. We prefer to adhere to the well-established rule in relation to the investment of trust funds, and, if a change is to be made, let the legislature make it."

This pronouncement of the law on the subject is certainly explicit, and was expressly assumed to be necessarily involved in the determination of the case, and we feel bound to so regard it.

We think that ch. 317, Laws of 1903, relating to the investment of trust funds by executors, guardians, and trustees, bears evidence that the legislature deemed this to be the established law. Section 1 of this act reads:

"Every executor, guardian or trustee, except where it is otherwise expressly directed by the will or instrument of trust, if any, may invest trust funds in governmental and real-estate securities as provided by law, and also, may, under the direction and with the approval of the proper court, invest trust funds" as therein enumerated.

The language, "may invest trust funds in governmental and real-estate securities as provided by law," recognizes that the law of the state sanctions investments of trust funds according to the rule laid down in the decision in *Simmons v. Oliver, supra;* and we are led to believe that the legislature enacted this chapter in recognition of the law so declared, and modified the rule by enlarging the field for the investment of such funds to the extent and upon the conditions contained in the act. In view of this legislative and judicial declaration on the subject, we perceive no sufficient grounds for changing or modifying the established rule controlling trustees making investments of trust funds.

The investments reported to the court, as stated, were made prior to the passage of the chapter of the laws last referred to. The petitioners, however, properly asked the approval of the court for their future guidance in the administration of the trust in respect to these investments, as well as others they will likely be required to make out of this fund. None of the securities purchased, except those of the Chicago, Milwaukee & St. Paul Railway Company bonds, are of the class sanctioned by this act. The obvious intent of the legislature in adopting this act was to extend the field of investment of trust funds by executors, guardians, and trustees beyond the limits of governmental and real-estate securities, by including the classes enumerated in the act, under the direction and with the approval of the court. We find no ambiguity in the phraseology of the act. The language and the provisions clearly show how investments of trust funds shall be made. Before the passage of the act, trustees were not protected against loss

of trust funds, though acting in good faith, unless they invested in governmental or real-estate securities. Under the provisions of this law, they may also invest in the securities specified in the act, if the court will approve and so direct. This clearly implies that no other investment of trust funds comes within the protection of the law.

The *Milwaukee Trust Company* is one of the trustees who made these investments. It is argued that sec. 1791*h*, Stats. 1898, gives it the right, in its discretion, to invest these trust funds in the manner as reported to the court. Looking to the subject-matter and intent of this section, and giving effect to the evident purpose and idea of the legislature as therein expressed, it is manifest that the section relates solely to the investment of the funds owned by the trust company in its corporate capacity, and does not include money held by it in trust as executor, administrator, or any other trust relation.

It is claimed these investments can be justified as properly made under the authority and direction of the will. The will grants the trustees "full power and authority in their discretion to invest . . . and employ said real estate and generally manage the same; to continue the same as it is invested at the time of my death—and especially as invested in the E. P. Allis Company, or to change such investments." The powers thus conferred are of the broadest kind, and are to be exercised by the trustees, in their discretion, in the execution of the trust. The purpose of the testator, manifested in this and other provisions of the will, evidently was to have the trustees invest and employ the *corpus* of the estate in obtaining securities in kind like those specified in the will; and he contemplated that they should purchase such securities as a prudent and provident person would purchase as good and safe investments, and that they should not be restricted to the conditions and limitations imposed by law for the investment of trust funds. Under the powers so given the trustees, and the facts found by the court, these investments "were such as

an ordinarily prudent person would make, having regard to the permanence and security of the principal, as well as the production of an income for the beneficiaries under the will;" and we hold that the trustees, in purchasing these securities, acted within the authority and direction as expressed in the will, and the court properly approved them.

The county court approved the course pursued by the trustees in applying a part of the annual earnings of these securities to the payment of the premium for the purpose of restoring to the *corpus* of the estate the exact amount taken therefrom for premiums at the time of purchase. The circuit court reversed the holding of the county court, and directed that all of the annual income from these securities be paid to the life tenants during the existence of the trust. The trustees have pursued the course of taking from the annual income a portion, under established rules and tables fixing the amount to be taken from each annual payment on the investments, to repay the *corpus* of the estate the amount paid therefrom as premiums in purchasing the security. Though the basis of this calculation is not before us, we assume that it was correctly made, and based upon computations which are accepted as standard in computing what amount should be regularly taken from the annual payments on the investments for repayment of the capital advanced as premium. It is contended that their course in thus apportioning the annual payments is an unjust charge upon the interest of the life tenant, and gives the remainderman an unfair advantage, by increasing the *corpus* of the estate, for the reason that the securities may grow more valuable, and be converted into money, and thus augment the capital of the estate by the portion annually taken from the income and the increase of value realized in excess over cost. This, no doubt, is the result under the circumstances supposed; but it is likewise true that, in case the securities decrease in value while owned by the estate, and if they must then be converted into money, the capital of the es-

tate is diminished by the amount of such depreciation. At the close of these transactions, whatever amount is realized by the trustees would constitute the new *corpus* of the estate, whether increased or diminished, of which the life tenant is entitled to the income. But the element of rise and fall in the price of securities as a marketable commodity is of little weight in dealing with investments of trust funds, for the reason that trustees are not permitted to traffic in stocks and securities, like individuals, for the purposes of gain. The principles controlling their investment are safety and permanency, with the view of securing a probable income for the beneficiaries. Treating the purchase of securities in this view, it is obvious that the amount advanced out of the capital of the fund for the payment of premiums should be made good, to prevent a loss when the securities mature. Payment of the whole annual income to the beneficiaries for life would produce this loss, and diminish the principal, to the injury of the remainderman. This method of dealing with the fund operates most equitably between the life tenant and the remainderman, in that they mutually share the advantages and losses.

The suggestion that, since the securities will not mature until the trust shall have expired, and in all probability they will not diminish in value, it would be unjust to the life tenants not to pay them all the annual income, does not, in our view, warrant treating the payments as interest only, and as belonging to the life tenants. We take it that the repayment of premiums out of the annual income of the securities is based on the idea that the premium is an advancement of capital above the face of the obligation, which can only be realized and repaid out of the annual income or earning of the security, since the final payment will only pay an amount equal to the face of the security, and that the annual income is in fact a repayment of a part of the capital thus advanced for investment, and that such repayment is proportioned to the

number of years the security runs, or the longest period which experience in dealing with securities has shown can be allowed, with reasonable safety, for the repayment of premiums, in view of the uncertainty of the value of securities at remote periods. We deem this course in the administration of trust funds as just and equitable between the life tenant and the remainderman. It preserves the *corpus* of the estate as nearly as the changes in business affairs will permit, and affords the best protection to the life tenant, by assuring him an income equal to the current rate of interest on the fund held in trust for his benefit. *New York Life Ins. & T. Co. v. Baker,* 38 App. Div. 417, 56 N. Y. Supp. 618; *S. C.* 165 N. Y. 484, 59 N. E. 257. As stated by the supreme judicial court of Massachusetts in *New England T. Co. v. Eaton,* 140 Mass. 532, 4 N. E. 69:

"There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par, and is payable at the termination of a fixed time; deducting from such interest, as it becomes due, such sums as will at maturity pay the premium."

By the Court.—The judgment is reversed as to that part which disapproves of the course pursued by the trustees in applying a portion of the annual payment received as income on the investments to the repayment of the amount advanced from the capital as premiums, and is affirmed in all other respects.

PERELES and another, Executors, Respondents, vs. LEISER, Executor, imp., Appellant.

October 21—November 15, 1904.

Mortgages: Foreclosure: Judgments: Appeal and error: Limitation on time within which appeal can be taken from deficiency judgment: Dismissal of appeal.

1. Under sec. 3039, Stats. 1898, limiting the time within which an appeal may be taken from a judgment, an appeal taken February 4, 1904, from a judgment entered November 3, 1900, is too late, and will be dismissed.
2. On foreclosure of a mortgage, the judgment of foreclosure and sale, entered on default November 30, 1900, adjudged the estate of defendant's testatrix, a married woman, personally liable for the debt, and contained provision for a judgment for deficiency against her estate. On confirmation of the report of sale, such deficiency judgment was entered February 5, 1902. Defendant, as such executor, on February 4, 1904 appealed from such deficiency judgment, and also from that part of the judgment of foreclosure and sale which adjudged the estate of his testatrix personally liable. *Held*, that the judgment of foreclosure and sale, not having been appealed from within the time limited by statute, was conclusive on the executor, and that there was no merit in the appeal from the formal judgment for deficiency.

APPEALS from judgments of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Appeal from one judgment dismissed; from the other affirmed.*

This action was commenced August 24, 1900, by the testator of the plaintiffs to foreclose a note secured by mortgage on the real estate described, both executed by Sarah Leiser to Francisca Strobel, June 1, 1894, for $500, payable three years after the date thereof, with interest thereon at 6 per cent. from the date thereof. The mortgage was recorded June 15, 1894. Sarah Leiser died testate June 16, 1895, her will was admitted to probate July 10, 1895, and the defendant *Isidor Leiser* was appointed executor thereof September 14, 1895. June 30, 1900, in consideration of $547.50 paid, the

said Francisca Strobel assigned said note and mortgage to the testator of the plaintiffs, Benjamin Franklin Pereles, which assignment was duly recorded July 5, 1900. Notice of *lis pendens* was filed September 11, 1900. November 3, 1900, judgment of foreclosure and sale was entered in this action by default. Said judgment contained the following provision, to wit:

"It is further ordered, adjudged, and decreed that if the proceeds of such sale shall be insufficient to pay the amount adjudged to the plaintiff, aforesaid, with interest and costs, the said sheriff specify the amount of such deficiency in his report of sale, and, upon filing said report and its confirmation, that judgment be entered and docketed in favor of the plaintiff and against the estate of Sarah Leiser, which is liable for the amount of such deficiency and interest from the date of sale, and that the plaintiff have execution therein to enforce payment of the same."

December 30, 1901, upon due notice, the sheriff sold the mortgaged premises to one *Herman Pereles* for $200. January 9, 1902, the sheriff's report of such sale was filed, from which it appeared that there was a deficiency on said sale of $596.43. February 1, 1902, the defendant *Isidor Leiser,* as such executor of the will of Sarah Leiser, deceased, filed his petition, and therein offered to prove the allegations alleged, praying that the plaintiff be permitted to take no further or other judgment, and that no judgment for deficiency be entered against such estate of Sarah Leiser, deceased. February 5, 1902, and upon such petition and the records, files, and proceedings therein, and upon motion of the plaintiff's attorney, it was "ordered and adjudged that the said sheriff's report and sale be, and the same are hereby, confirmed, for the reason that the executor has no right to contest the final foreclosure judgment entered by default over a year ago, and because said judgment is a final judgment; and it is further ordered and adjudged that the plaintiff herein recover of *Isidor Leiser,* as executor of the last will and testament of

Sarah Leiser, deceased, the sum of $596.43, being the deficiency specified in said report of sale—said sum to be chargeable upon and collected out of the estate of said Sarah Leiser, deceased—and that the clerk of this court enter judgment accordingly, and certify the same to the county court as a claim against said estate;" and such judgment was duly docketed February 5, 1902. February 4, 1904, the defendant *Isidor Leiser,* as such executor, appealed to this court from that part of the judgment of November 3, 1900, quoted above, and also from the whole of the order and judgment so rendered February 5, 1902, and quoted above.

In pursuance of the stipulation of the parties herein made August 26, 1904, it was thereupon ordered by this court that *Max* and *Herman Pereles* be substituted as plaintiffs and respondents in place of Benjamin Franklin Pereles, who died testate June 22, 1902, and whose will was admitted to probate June 28, 1902, and September 5, 1902, *Max* and *Herman Pereles* were duly appointed executors of such will, and have since acted as such, and that this appeal be revived in their names.

H. L. Eaton, for the appellant.

For the respondents the cause was submitted on the brief of *W. O. Thomas.*

CASSODAY, C. J. Counsel for the plaintiff moves to dismiss the appeal from that part of the judgment of foreclosure and sale entered November 3, 1900, and quoted above, for the reason that it was not taken within "two years from the date of the entry of such judgment or order," as prescribed by the statute (sec. 3039, Stats. 1898). As appears from the foregoing statement, such appeal was not taken until more than three years after "the entry of such judgment or order," and hence we perceive no reason why that appeal should not be dismissed.

The question recurs whether the matters determined in the

judgment of November 3, 1900, are conclusive upon the parties, or are reviewable on the appeal from the judgment of deficiency entered February 5, 1902. The original judgment determined the amount due to the plaintiff therein, and, in the portion quoted in the foregoing statement, ordered and adjudged "that judgment be entered and docketed in favor of the plaintiff, and against the estate of Sarah Leiser, which is liable" therefor. Upon the appeal in the other case between the same parties, such a judgment was held to be erroneous, but not void. *Pereles v. Leiser,* 119 Wis. 347, 96 N. W. 799. Counsel contends, however, that it was not a judgment for deficiency, and that no such judgment could be taken until the confirmation of the sheriff's report of sale, or afterwards. The statutes regulating the entry of such judgments provide:

"In actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale, as hereinafter provided." Sec. 3154, Stats. 1898.

And then, after stating how the proceeds of the sale should be applied (section 3155), the statute further provides:

"In all such actions the plaintiff may in his complaint unite with his claim for a foreclosure and sale a demand for judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises against every party who may be personally liable for the debt secured by the mortgage; . . . and judgment of foreclosure and sale, and also for any such deficiency remaining after applying the proceeds of sale to the amount adjudged to be due for principal, interest and cost, may in such case be rendered. Such judgment for deficiency shall be ordered in the original judgment, and separately rendered against the party liable on or after the coming in and confirmation of the report of sale, and be docketed and enforced as in other cases." Sec. 3156, Stats. 1898.

Another section of the statute provides, so far as it applies to this case:

"The judgment shall fix the amount of the mortgage debt then due . . . and shall adjudge that the mortgaged premises be sold for the payment of the amount adjudged to be due, . . . and, when demanded in the complaint, an order directing that judgment be rendered for any deficiency against the parties personally liable therefor." Sec. 3162, Stats. 1898.

In *Gaynor v. Blewett,* 86 Wis. 399, 400, 57 N. W. 44, Mr. Justice ORTON, construing these sections, and speaking for the court, said:

"The statute requires that judgment for the deficiency shall be ordered in the original judgment. The order is a necessary part of the judgment of foreclosure, and it is a final adjudication of the defendant's common-law liability for the debt. The formal judgment is rendered and docketed as of course on the coming in and confirmation of the report of sale showing the amount of the deficiency."

It was there held that the part of the judgment for such deficiency was appealable. That was followed in *Kane v. Williams,* 99 Wis. 65, 72, 74 N. W. 570, where it was claimed that such part of the judgment for deficiency was "a mere order," and not appealable; but the court held that the point was not well taken, and that it was "an integral part of the judgment," and fixed the rights of the parties, and hence was appealable. That was followed in *Richards v. Land & River Imp. Co.* 99 Wis. 625, 629, 75 N. W. 401. See, also, *Duecker v. Goeres,* 104 Wis. 29, 38, 80 N. W. 91.

We must hold that the original judgment to the effect that the estate of Sarah Leiser was liable for such deficiency, not having been appealed from within the time limited by the statute, is conclusive upon the executor. It necessarily follows that there is no merit in the appeal from the formal judgment for deficiency, entered February 5, 1902.

By the Court.—The appeal from the part of the original judgment entered November 3, 1900, of the superior court of Milwaukee county, is dismissed. The formal judgment for deficiency entered February 5, 1902, is affirmed.

PERKINS, Respondent, vs. OWEN, imp., Appellant.

October 21—November 15, 1904.

Executors and administrators: Jurisdiction of county court: Letters of administration: Subsequent discovery of will: Effect on prior administration: Compromise and settlement: Release: Estoppel: Equitable estates: Parol evidence: "Claims."

1. The jurisdiction of the county court over the settlement of the estate of one who at the time of his death was an inhabitant or resident of the county over which such court exercises jurisdiction, does not depend upon the presence or absence of a will.
2. Where letters of administration are issued on the mistaken idea that no will was left, and a will be afterward found and proved, such letters and all acts of the county court inconsistent with the due administration of the estate under the terms of the will may be revoked; but such action is not taken because the prior proceedings are void for lack of jurisdiction to administer the estate as intestate, but on the ground that they have been erroneous.
3. In such case, in the absence of some controlling intervening fact, the county court should set aside the administration proceedings, unless rights thereunder have become confirmed by virtue of the statute of limitations.
4. One, husband of plaintiff, and son of defendant, died, supposedly having devised his estate to them equally, but no will was found. Thereupon the widow administered the estate, as intestate, and such proceedings were regularly had that a final decree was entered by the proper county court assigning the whole estate to the widow. Thereafter the widow conveyed certain of the real estate to deceased's mother, and, as part of the same transaction, the mother executed a release to the widow "of any and all claims I may have against the estate of my said son and of my claims against" said widow. Both were *sui juris*, had full knowledge of all the necessary facts, of the possibility that a will might be found, and there was no fraud or overreaching. Thereafter a will was found, devising the estate one-half to each, which was duly probated. In an action by the widow to remove such will as a cloud on her title obtained through such settlement, *held:*
   (1) The mother was estopped by her release.
   (2) The mother, having received the deed in consideration

of relinquishing any claim to the balance of the estate, made a compromise of doubtful claims binding on her.

(3) The release vested in the widow the equitable estate in the remaining lands entitling her to a decree in equity removing the cloud from her title.

5. In such case, parol evidence was admissible to show that the word "claims" in the release referred to the possible claims of the mother under the supposed will afterwards discovered.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action in equity to remove a cloud from the title of two parcels of land in the city of Milwaukee. The plaintiff is the widow, and the defendant the mother, of one George B. Owen, who died January 21, 1890, leaving no heirs at law except his widow, the plaintiff. At his death he owned an undivided one-half of three parcels of land in Milwaukee, his brother David G. Owen owning the other half thereof. He also owned the whole of one other tract of land. These lands will be referred to as tracts Nos. 1, 2, 3, and 4, respectively, in this opinion. Tracts Nos. 3 and 4 are the lands which are concerned in this action.

At the time of the death of George B. Owens it was supposed by all concerned that he left a will disposing of his property in equal shares to the plaintiff and the defendant; but no will being found after diligent search, the plaintiff commenced proceedings in the county court of Milwaukee county to administer the estate as an intestate estate, which proceedings progressed in due course and culminated in a final decree assigning the estate to the plaintiff, February 4, 1891. After this decree, and on February 16, 1891, the plaintiff executed, acknowledged, and delivered to the defendant a quitclaim deed of tracts Nos. 1 and 2 aforesaid, which deed contained the following clause:

"And said *Jane Owen* hereby accepts of this conveyance of said premises in full of any and all claims she may have against the said *Maude A. Owen* or against the estate of George B. Owen, deceased, who was her son."

At the same time, and as part of the same transaction, the defendant executed and delivered to the plaintiff the following release:

"In County Court, Milwaukee County. In Probate. In the Matter of the Estate of George B. Owen, deceased.

"I, *Jane Owen,* mother of said deceased, do hereby, in consideration of the conveyance to me made by *Maude A. Owen,* widow of my said son, of the undivided one-half of lots one (1) and two (2) in Block fifteen (15) Homewood, Town of Wauwatosa, and the undivided one-half of lots eleven (11) and twelve (12) in Block thirty-five (35) Clarke's Addition, Eighth Ward in the city of Milwaukee, county of Milwaukee, Wisconsin, which deed of conveyance is delivered concurrent herewith to me, acknowledge full satisfaction of any and all claims I may have against the estate of my said son and of my claims against said *Maude A. Owen* and do execute this release in consideration of the foregoing and upon the further consideration of love and affection.

"Witness my hand and seal this 16th day of February, A. D. 1891.

"JANE OWEN. [Seal.]"

On June 20, 1892, the defendant conveyed tract No. 2 to David G. Owen. About June 21, 1900, David G. Owen found the will of George B. Owen, which will, after the payment of debts, devised all of his property to the plaintiff and defendant, share and share alike. It was thereafter duly probated, and David G. Owen appointed executor, and under it the defendant now claims to own an undivided quarter of tract No. 3 and an undivided half of tract No. 4. The plaintiff, by her complaint and by testimony on the trial, claims that the deed and release aforesaid was given in full settlement of all conflicting claims to the real estate of George B. Owen; that it was supposed that there might be a will in existence, and that in order to settle all claims it was agreed that the widow should convey tracts Nos. 3 and 4 to the defendant, and the defendant should release all her claims to any part of the estate, whether the supposed will ever turned

up or not; and hence that the transaction in equity bars the defendant from claiming any title under the will. The defendant denies that the release was given with any intention of releasing any rights under the will if a will was found, and by way of counterclaim she claims title to one-half of the estate under the will, and offers to reconvey to the plaintiff all the interest in tracts Nos. 1 and 2 which the plaintiff conveyed to her, and prays that the final decree in the administration proceedings be set aside, and that she be decreed to be the owner of one-half of the estate, and that the plaintiff account.

The court found that the release was given by way of settlement of all claims under the will, if any will was found, and entered judgment for the plaintiff quieting the title in her of tracts Nos. 3 and 4, and dismissed the counterclaim, and from this judgment the defendant appeals.

For the appellant there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. H. Noyes.*

For the respondent there was a brief by *Timlin & Glicksman,* and oral argument by *W. L. Gold.*

WINSLOW, J. After carefully reading the evidence, we find nothing to warrant a reversal of any of the findings of fact of the trial court. The facts, in brief, are these: Owen died owning four parcels of land, and leaving his widow as his sole heir at law. His widow and his mother both supposed that he left a will dividing the property between them, but, being unable to find it, the widow finally administered the estate as though it were intestate, and obtained a final order of the county court, upon due notice, assigning all of the real estate to her. Both widow and mother being still uncertain whether a will might not yet be found, met and agreed that all claims of the mother as to the property (whether any will afterwards was found or not) should be adjusted and settled by the execution of a deed by the widow to the mother of two

of the parcels of land, and the execution of a release by the mother of all claims against the estate and the widow. This settlement was fully carried out, and the will was afterwards found and probated. The question is whether the settlement so made is effective.

The first contention made is that the decree of the probate court assigning the estate is of no effect because the court had no jurisdiction. The argument is that, before a probate court has jurisdiction to administer an estate as intestate estate, the fact that the deceased died *intestate* must exist, and in support of this claim sec. 3806, Stats. 1898, is relied upon, which says:

"When any person shall die *intestate,* being an inhabitant of this state, letters of administration of his estate shall be granted by the county court of the county of which he was an inhabitant at the time of his death."

The contention is that two facts are essential to jurisdiction to grant letters of administration, viz., the fact of death and the fact of intestacy, and if either fact is missing there is no jurisdiction. This court has held that proceedings for the administration of the estate of a person supposed to be dead, but afterwards ascertained to be alive, are absolutely null and void. *Melia v. Simmons,* 45 Wis. 334. It has not been held, however, that the discovery of a valid will renders void for lack of jurisdiction all administration proceedings previously taken, nor do we think it should be so held. The general grant of jurisdiction to the county court is found in sec. 2443, Stats. 1898, which, so far as necessary to be quoted here, is as follows:

"The jurisdiction of the county court shall extend to the probate of wills and granting letters testamentary and of administration on the estates of all persons deceased who were at the time of their decease inhabitants of or residents in the same county."

Briefly stated, this means that the county court has jurisdiction of the settlement of the estates of all deceased inhabit-

ants or residents of the county. It is not necessary to the jurisdiction of the court over the estate that a will should be left, but it is necessary that the supposed deceased should be in fact dead. True, the question whether letters testamentary or letters of administration shall issue depends upon whether there was a will or not, but the jurisdiction of the court over the estate does not depend upon the presence or absence of a will. If letters of administration be issued on the mistaken idea that no will was left, and a will be afterwards found and proven, the letters of administration will of course be revoked, and all acts of the county court inconsistent with the due administration of the estate under the terms of the will will doubtless be revoked upon motion, but such action will not be based on the idea that all such acts have been void for lack of jurisdiction, but rather on the ground that they have been erroneous. The county court has administered the estate in the wrong way; it has not administered an estate over which it had no jurisdiction. This view is supported by authority. *Schluter v. Bowery S. Bank,* 117 N. Y. 125, 22 N. E. 572; *Franklin v. Franklin,* 91 Tenn. 119, 18 S. W. 61. The appellant cites *Chase v. Ross,* 36 Wis. 267, and *Sitzman v. Pacquette,* 13 Wis. 291, as sustaining her proposition, but we have not been able to see wherein these cases are particularly helpful or relevant to the question here. It will be noticed that the statutes of the state (secs. 3815–3817, Stats. 1898) contemplate just such a situation, namely, the situation created by the discovery of a will after the partial administration of the estate as intestate, and these statutes recognize as legal the acts of the administrator done prior to the revocation of his letters, and provide for the continuation of the settlement of the estate from the point at which the administrator leaves it. It seems that these statutes may not have been necessary, but the very fact of their existence is valuable as demonstrating the legislative idea and intention on the subject. We can entertain no doubt, therefore, that the decree in

the administration proceedings was a decree within the jurisdiction of the court to render. It was erroneous because a will was in fact in existence making a different disposition of the property, and as soon as that fact came to light the court should upon application (in the absence of some controlling intervening fact) set it aside, just as it should set a decree procured by fraud, unless rights thereunder have become confirmed by virtue of the statute of limitations. *Estate of Leavens,* 65 Wis. 440, 27 N. W. 324. Until set aside, however, the decree was effective upon the parties, because it was within the jurisdiction of the court, and was rendered upon due notice to all parties of the application for such decree. *Appeal of Edward Schaeffner,* 41 Wis. 260.

Now, it appears in the present case that after the rendition of this decree the widow and mother of deceased came together, and, recognizing the fact that a will might still be discovered giving the mother greater rights, agreed that two parcels of land should be conveyed by the widow to the mother, and a receipt in full of all claims given by the mother, which was to be a full settlement of any claim on her part, whether any will should afterwards be found or not, and this arrangement was carried out. The parties were both *sui juris,* and each had knowledge of all the necessary facts and of the possibility that the will might yet be found. There was no fraud or overreaching by either party. There was an intent on both sides to close the door to any possible claim or litigation in the future. Such a settlement ought to be sustained if possible, and we think it possible on familiar and just principles. If no other principle could be invoked, that of estoppel would be sufficient under the circumstances of this case. The plaintiff deeded to the defendant two parcels of land on the strength of the release of claim, and since that time has paid and discharged a mortgage of $1,400 upon tract No. 3. Probably, however, resort to estoppel is not necessary. A compromise of doubtful rights, where each party acts with knowledge of

the facts and without fraud, is favored in the law, and it will be sustained though it may be unequal or harsh in its operation. *Kercheval v. Doty,* 31 Wis. 476. While the defendant made no deed to the plaintiff of any of her rights in the land, still, when she received a deed to part of the land in consideration of relinquishing any claim to the balance, she doubtless made a binding compromise of doubtful claims, and, though the release so given may not amount to the conveyance of a legal title, it surely vests the equitable estate of the remaining lands in the plaintiff, and entitles her to a decree in equity removing the cloud from her title.

Contention is made that evidence was not admissible to show that the word "claims" in the release referred to the possible claims of the defendant under the supposed will. It was entirely competent to identify the subject-matter intended to be covered by the general word "claims" by evidence showing the circumstances of the transaction. This is not varying or contradicting the terms of the contract, but making certain what subject was covered or intended to be covered by a general word capable of referring to many things.

By the Court.—Judgment affirmed.

THE STATE EX REL. WEBER, Appellant, vs. BOARD OF TRUSTEES OF THE POLICEMEN'S PENSION FUND FOR THE CITY OF MILWAUKEE, Respondent.

October 21—November 15, 1904.

Municipal corporations: Police force: Pension fund: Right to participate: Disability and subsequent discharge of applicant.

Ch. 265, Laws of 1899, providing for the creation of a pension fund for policemen in cities of the first class, declares, among other things, it is for the benefit of disabled and superannuated members of the police department, etc.; that if any member of

the police department shall, while engaged in the performance of his duty, be injured and found upon examination to be physically or mentally permanently disabled by reason of service, the governing board of the pension fund, after examination and report of a medical officer, ordered by such board, shall retire such disabled member from service; that the act shall apply to present and future members of the police force; that the act is amendatory of the charter of all cities of the first class; that any provision in any such charter in conflict therewith is superseded, and that any other provisions of any act or law in force or effect, so far as they conflict with the provision of that act, are repealed. Relator, while a member of the police force of a city of the first class, by loss of one foot, was injured so as to incapacitate him for active service, and, pending application for retirement and pension, was discharged from the force. *Held:*

(1) The governing board of the pension fund cannot enter the final order of retirement unless the candidate is *in præsenti* a policeman.

(2) The right to a pension is not vested at the time of the disablement, subject to the report of the examining physician, so as to suspend the authority of dismissal for cause.

(3) The act applies to one who was a policeman when the act took effect, or thereafter became such, but conditioned upon his satisfying the calls of eligibility at the time when the retiring board is required to act.

(4) The act has no reference to those provisions of the city charter regarding the organization and management of the police force, which are subjects entirely foreign to the pension law.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Mandamus action to compel defendant to appoint a physician to examine the petitioner as to his eligibility for the retired list of policemen of the city of Milwaukee, with the right to participate in the policemen's pension fund, under ch. 265, Laws of 1899, and to report his conclusions to the board of trustees of such fund.

The petition was, in the main, to this effect: The relator, January 2, 1890, became a member of the police force of the city of Milwaukee. He remained such till the commence-

ment of this proceeding, unless it be otherwise because of circumstances hereafter mentioned. He contributed to the policemen's pension fund, as required by law, from 1899 until May 1, 1902, when his name was stricken from the payroll of the department. May 27, 1901, while attempting to board a street car to go from his beat to his home, he was permanently injured by losing his left foot, whereby it was rendered necessary that he should be retired from the police force. January 17, 1902, as a patrolman, he filed his petition with the trustees of the policemen's pension fund for due proceedings to be taken for his retirement, with the right to participate in the pension fund under ch. 265, Laws of 1899. December 3, 1903, such application was denied upon the ground, that prior thereto he was duly discharged from the police force. After he recovered from his injury so as to report for duty, he did so and was thereupon informed by the chief of police that in his crippled condition he could not be used. Shortly thereafter he learned, incidentally, that it was claimed that he had been discharged for being intoxicated while on duty. The charge made against him in that regard was groundless.

The return to the alternative writ was in part to this effect: September 20, 1901, a lieutenant of the police force of the city of Milwaukee presented to the chief of police, in writing, formal charges against the petitioner, to the effect that he was intoxicated when injured, accompanying the charges with a recommendation that a hearing should be granted him, at a place and time specified. Pursuant to such recommendation such hearing was duly had before the chief of police at his office, four members of the board of police commissioners being present. He appeared at such hearing in person and by attorney. Witnesses were produced, sworn, examined and cross-examined on both sides of the controversy. At the close of the testimony the matter was taken under advisement by the chief of police. On May 1st thereafter the petitioner

was duly found guilty of the charges against him and for that reason by order of the chief of police he was discharged from the force. He has not since been reinstated. By reason of his discharge he was not entitled to be recognized by the pension board as eligible, under any circumstances, to a place on the pension roll.

To such return the relator answered, among other things, that at the hearing mentioned therein he was informed by the chief of police that he was permitted to be present at the hearing as a matter of favor only; that the chief acted without consulting his associates, who were believed to entertain opinions contrary to the conclusion reached by him.

Upon the petition, alternative writ thereto and answer to such return, a motion was made to quash such writ, which was granted. Judgment was rendered accordingly, dismissing the procedings with costs, and the relator appealed.

John Toohey and *Julius E. Roehr,* for the appellant.

For the respondent the cause was submitted on the brief of *Hoyt, Doe, Umbreit & Olwell.*

MARSHALL, J. The rights of appellant are ruled by chapter 265, Laws of 1899, providing for the creation and administration of a pension fund in such cities as Milwaukee, and sec. 9 of the amendment to the charter of such city [ch. 378, Laws of 1885], regarding the power of the chief of police therein to discharge members of its police force.

The first section of such pension law provides that it is for the benefit of "disabled and superannuated members of the police department and the widows and orphans of deceased members thereof." That unmistakably suggests at the outset a legislative idea that only members of the police department should be eligible to be placed on the pension roll. That is in harmony with sec. 8 of the law, which provides that "if any member of the police department shall, while engaged in the performance of his duty as such policeman, be

injured and found, upon examination by a medical officer, ordered by the said board [the governing board of the pension fund], to be physically or mentally permanently disabled by reason of service in such department, so as to render necessary his retirement from service in such department, such board shall retire such disabled member from service." There again it will be observed, only members of the police force are eligible to retirement to the pension list. The use of the word "retire" implies, necessarily, that a candidate for retirement to be eligible therefor must be so circumstanced at the time of favorable action upon his application that he can be retired, that he can be taken from the pay roll of the department and put on the pension roll.

True, the language of sec. 8 is to the effect that a policeman *"injured while in service and found,"* in the manner provided for, to be unfit for active service shall be placed on the retired list by the governing board of the pension fund. But viewing the section as a whole, it seems very plain that it contemplates that only members of the police force are eligible to retirement. The last part of the section "shall retire such disabled members" unmistakably indicates, as does the whole scope of the law, that the pension board are not expected to enter the final order of retirement unless the candidate is *in præsenti* a policeman.

Counsel for appellant suggest that if the foregoing construction of the law be the correct one the right to a pension should be deemed vested at the time the disablement of the policeman occurs, subject to the report of the examining physician, upon which the trustees of the pension fund are required to act, and that such vested right suspends the authority of the chief of police to dismiss its possessor, notwithstanding the general power granted to him in respect to dismissals from the force. Counsel argue that otherwise it would be within the power of the chief in any case to nullify the pension law as to one whom he desired to keep from the pen-

sion list. That at the first impression appeared plausible, but after a caref.. consideration thereof it seems unsound. Doubtless the legislative idea in lodging with the chief of police supreme disciplinary authority over the force under his charge was to impliedly bind him to administer it with discretion. It would be highly unreasonable, it seems, to hold that the jurisdiction of the chief is by mere implication ousted by the circumstance that otherwise an unfaithful member of the police force might lose his opportunity to participate in the benefits of the pension fund. Probably, if it were shown, clearly, in any case that the chief abused his discretion, his act would be held void for jurisdictional error and so not efficient to interfere with the subject thereof being eligible for a pension. But nothing of that kind is shown in this case.

We have not overlooked counsel's reference to secs. 11 and 17 of the pension law. The former provides that the act shall apply to present and future members of the police force of any city of the first class. That cannot be held to make every person who at the time of the passage of the law was, or who became thereafter, a member of the police force of such city necessarily eligible to a pension. Otherwise one might be so eligible years after his connection with the police department was terminated. True, the meaning of such section is that any one who was a policeman when the act was passed, or thereafter became such, may be eligible for a place on the pension roll, but conditioned upon his satisfying the calls for eligibility at the time when the retiring board is required to act, one of such calls being, as before indicated, for present membership on the force.

Sec. 17, referred to, was intended to make all the provisions of the city charter, on the subject of pensioning policemen, harmonize with the new system. It has no reference to those provisions of the charter regarding the organization and management of the police force. That is a subject entirely foreign to the pension law.

A suggestion is made as to how the pension law and the provisions of the city charter, empowering the chief of police to sever the relations of any member of the police force therewith can be harmonized. There is no want of harmony that we can discover, so we cannot enter the field of construction in respect thereto. The office of policeman of the city of Milwaukee is a legislative creation. The power that created it was competent, upon familiar principles, to make any regulation deemed best for filling the office and for creating a vacancy therein. The provisions in that regard are entirely independent of the pension legislation. The chief of police is required to perform his duties regardless of the pension department, and the governing board thereof is required to act upon a case within its jurisdiction, upon proper presentation thereof showing jurisdiction essentials, and not otherwise.

A fair analysis of the pension law and the Milwaukee city charter referred to, without the aid of anything other than elementary principles, would seem to lead logically to the conclusions above reached. A reference to *People ex rel. Tuck v. French,* 108 N. Y. 105, 15 N. E. 188, cited to our attention by respondent's counsel, shows that the same conclusion was reached by the New York court that we have arrived at. The decision turned on the effect of ch. 364, of the Laws of New York for 1885, providing that any member of the police force of New York City after having served twenty years or more, upon his own application in writing shall, by resolution adopted by a majority vote of all of the members of the board be relieved and placed on the roll of the pension fund. It will be observed that giving the force thereto which counsel ascribes to sec. 8 in the pension law here, a member of the New York police force upon serving the requisite time would possess a vested right to be placed upon the pension roll, which could not be disturbed by any administrative act thereafter suspending him from the force. The court held otherwise, saying in effect that it is competent for the police

board, having authority to discipline members of the force, to discharge one after his full term or twenty years' service has expired, regardless of the fact that his application for retirement is pending, and that such discharge ousts the pension board from jurisdiction to retire the applicant to the pension roll, as the law permits only members of the police force to be so retired;—that it is essential thereto that the subject thereof shall actually be a member of the police force at the time of the final act required to be performed by the retiring board transferring him from the active to the pension roll. It was there suggested, as here, that the application for a pension having been made no occurrence thereafter could affect the right of the applicant. This language was used:

"It is not that [the application for a pension] which retires, but the resolution of the board, passed by a majority of all its members, for so is the statute. That board has a right, and it is its duty, upon receiving the application . . . to determine, first, whether the applicant has, as he asserts, served for the full period of twenty years as a member of the force, and, second, what amount of pension within the prescribed limits should be awarded to him, . . . and make an order retiring the officer from the force. Until then he remains a policeman, subject to the decipline and authority of the board [the board having disciplinary authority was also the retiring board]. . . . Their order removing him from his office . . . was valid and effectual, and so he lost his position and with it all right to be retired upon a pension."

As there held the proceedings for retiring a policeman, under the law, contemplate putting an end to his services in that way. Therefore, to be eligible therefor one must actually be a policeman up to the final order placing his name on the retired list.

By the Court.—The judgment is affirmed.

PHELPS, Appellant, vs. MINERAL SPRINGS HEIGHTS COMPANY, Respondent.

October 21—November 15, 1904.

Contracts: Rescission: Action at law for return of consideration.

1. In order to maintain an action at law to recover back the consideration of a contract, it is essential that before it be commenced the rescission shall have been complete as to both parties.
2. One who had contracted for lands, but after full payment and demand had failed to receive a conveyance, cannot maintain an action at law for the purchase price, where it appears that a subsequent tender of a deed had been refused merely because it was too late, and that, prior to the commencement of the action, he had made no offer to surrender the equitable rights which he had received by force of the land contract and payment of the purchase price.
3. In such case, the evidence examined, and *held* not to disclose any declaration or conduct of the defendant constituting a notification that it would not accept a surrender of the land contract if tendered.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff on November 5, 1892, entered into a land contract to purchase certain vacant lots from the defendant for $1,200, payable in installments, with six per cent. interest. Within the term of said contract, as extended by mutual agreement, and about September 9, 1899, the plaintiff completed said payments, at the same time requested his deed, and was told by the defendant's clerk receiving the money that he could have it on that day or the following one, when it could be executed by the officers. Again, on September 15, 1899, one of the officers of that defendant explained that it could not be given at once, because of some dispute between the officers about executing papers. Thereupon, on September 15, 1899, a written demand for the deed was made; and again on October 6, 1899, through his attorneys, he made a

further demand, with a notification that otherwise he should ask a court to compel delivery. Thus the matter ran along, with an explanation at one time from plaintiff that he needed the deed in order to borrow money on the land. About December 27, 1900, Mr. Kaufer, an officer of the defendant company, asked plaintiff why he did not call for a deed, whereupon he said to him that it was too late to accept the deed, and he wanted his money back. No tender of deed by the defendant, or return of the land contract or any reconveyance by plaintiff, was made at this time. About December 31, 1900, Mr. Kaufer, on behalf of the defendant, tendered to plaintiff a warranty deed of the premises described, which plaintiff refused. Again, on January 14, 1901, this deed was mailed by the attorneys for the defendant to the plaintiff, and returned by the latter, through his attorneys, accompanied by a letter declaring that *Mr. Phelps* had notified the company of his rescission of the purchase, and that he considered his money should be returned to him. To this the defendant's attorneys replied that the deed was at their office, where *Mr. Phelps* might obtain it at any time. In August, 1901, the plaintiff commenced this action, alleging breach of the contract by the defendant and his rescission of the contract, and praying judgment for the amount of moneys paid by him thereon. Upon the trial, plaintiff tendered deposit and surrender of the land contract, and defendant tendered the warranty deed. The trial court, upon substantially the foregoing facts, directed a verdict for the defendant, from judgment on which the plaintiff brings this appeal.

For the appellant there was a brief by *Wheeler & Perry,* and oral argument by *L. G. Wheeler.*

For the respondent there was a brief by *Timlin & Glicksman,* and oral argument by *Nathan Glicksman.*

DODGE, J. This action is for the recovery of that with which plaintiff had parted upon the faith of a contract which,

by reason of its breach by the defendant, he claims that he had a right to rescind, *in toto,* and had done so. It is not a suit in equity to obtain a rescission, but a plain action at law to recover back the consideration paid. To maintain such action, it is essential that before it is commenced the rescission shall have been complete as to both parties. It is not enough that the plaintiff may have, by some decisive act, so declared his own election as to whether the contract shall stand or be rescinded that he cannot recede therefrom, which was the situation presented in *Smeesters v. Schroeder, ante,* p. 116, 101 N. W. 363. He must not only have exercised and declared that election, but must have returned or offered to return to the other party that which he had received. *Weed v. Page,* 7 Wis. 503, 513; *Hyslip v. French,* 52 Wis. 513, 9 N. W. 605; *Hoffman v. King,* 70 Wis. 372, 381, 36 N. W. 25; *Ludington v. Patton,* 111 Wis. 208, 245, 86 N. W. 571; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 439, 89 N. W. 538, 92 N. W. 246. To that rule there are certain exceptions under peculiar circumstances, which are illustrated in *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079; *Gates v. Raymond,* 106 Wis. 657, 82 N. W. 530; *Roberts v. Francis, ante,* p. 78, 100 N. W. 1076; *Bostwick v. Mut. L. Ins. Co. supra*—which are not rendered applicable by any of the facts in the present case.

The evidence most favorable to plaintiff—his own testimony—discloses nothing whatever of any offer in any way to return or surrender to defendant the equitable rights which he had received from the latter by force of the land contract and his payment of the purchase price. He testifies merely that, when asked why he did not call for his deed, he replied, "It was too late to accept a deed, and that I wanted my money back;" nor, when deed was actually tendered him, did he offer any completed rescission, even when acting through and under advice of counsel. The response covering the rejection of the deed was merely that his condition had been changed

by the delay, and "he thinks that the proper thing would be to return his money." Neither does the evidence disclose any declaration or conduct on the part of the defendant constituting a notification that it would not accept a surrender of the land contract if tendered, such as might have brought plaintiff within the exception applied in *Roberts v. Francis, supra.* We must therefore come to the conclusion reached by the trial court, that up to the time of commencing suit—indeed, to the time of trial—there had not been accomplished any complete rescission of the land contract; hence, that no implied contract to return the consideration had arisen to support an action at law for that money.

By the Court.—Judgment affirmed.

NAGLE, by guardian *ad litem,* Respondent, vs. HAKE, Appellant.

October 22—November 15, 1904.

Electricity: Personal injuries: Evidence: Actionable negligence: Proximate cause: Cause of action: Compromise and settlement: Custom and usage: Witnesses: Appeal and error: Presumptions: Infants: Parent and child: Negligence of the parent: Cross-examination: Instructions to jury.

1. In an action for personal injuries to an infant alleged to have been occasioned by defendant's negligence in leaving within the reach of such child a wire, in such position that it came in contact with a heavily charged electric wire, the evidence, stated in the opinion, is *held* to show that defendant was guilty of a negligent act, from which an injury to another was to be anticipated as a natural and probable result.
2. In an action by an infant for personal injuries, originally commenced against two defendants, one of the defendants paid a sum in settlement of the damages claimed by the father, with an understanding that the action should be dismissed as to

that defendant, which was done. There was no release given by the plaintiff for the damages suffered by him, nor was any money paid or agreed to be paid him by or on behalf of such defendant for such a release. The dismissal was without prejudice, and there was nothing to prevent another action being begun. *Held*, that it was competent for the father to settle his own individual claim for damages on account of his son's disablement, and that fact did not affect the son's separate claim.

3. A witness must show that he knows about a general trade custom before he can be heard to testify in regard to it, and, in the absence of such showing, it is not error to sustain objections to questions calling for statements as to what is such custom.
4. Testimony directed to the individual custom of a witness is incompetent.
5. In an action for personal injuries sustained by coming in contact with a wire charged with electricity, a witness testified to examining the wire and its fastenings. *Held*, that it was not error on cross-examination to strike out an affirmative answer to an inquiry as to whether the wire was fastened to the insulator in the usual way. Such would be the presumption, in the absence of any evidence.
6. In an action for personal injuries to an eight-year-old infant occasioned by coming in contact with a live wire, where it appeared that both the father and mother knew of the wire before the injury, it is not error to sustain an objection to a question asked defendant, as to whether the mother objected to the defendant's placing the wire where he did.
7. In such case, it is not error to permit the father and mother to testify, against objections, that no one told them the wire was dangerous, and that they did not know that it might become dangerous. Such testimony is competent as bearing on the question of the parents' negligence.
8. Where an eight-year-old child was injured by coming in contact with a telephone wire, which had been negligently allowed to come in contact with heavily charged electric and trolley wires, evidence of an engineer employed by the light and railway company as to the voltage carried on its electric light and trolley wires; as to the effect of contact between wires; as to the insulation of wires and the absence of guard wires; and other facts tending to show the condition of the various wires in the vicinity at the time of the injury, is admissible.
9. In an action for injuries from a telephone wire heavily charged with electricity by coming in contact with a live wire, where a witness had testified on direct examination that a certain

wire, maintained at a certain point, was covered with what was called "weather-proof" insulation, it was not error to exclude as improper cross-examination, questions as to whether additional insulation would not be safer; whether there would not be less danger in case of contact with another wire, and whether it was not customary to place guard wires over such wires to prevent contact.

10. Where, in an action for personal injuries, the court carefully defined proximate cause, and instructed the jury that in order to find that the negligence of the defendant was the proximate cause they must be satisfied of the necessary facts by a fair preponderance of the evidence, it is not error to refuse a requested instruction expressing simply the converse of such instruction.

11. In an action for personal injuries, where the court had already defined ordinary care as "such care as the mass or majority of mankind exercise under the same or similar circumstances," an instruction to the jury, in substance—that the defendant in breaking, coiling, and hanging the dead or uncharged wire (which caused the injury), is presumed to have known that it was an electric wire, and to have known and realized the dangerous properties of the electricity; that a higher degree of care was necessary when a thing on account of which an injury may be caused was a highly dangerous one; that dead electric wires may be enlivened or become charged with a current of electricity by coming in contact with a charged wire, and that in case any person touched or grasped such a wire it would, or might reasonably be expected to endanger the life or limbs of any person touching it—is not erroneous because it requires of defendant the exercise of more than ordinary care.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries suffered by the infant plaintiff by accidentally coming in contact with a telephone wire charged with a heavy current of electricity. There is very little dispute as to the facts. It appears by the evidence that the appellant, *Hake,* was a house mover by occupation, in Milwaukee; that about June 20, 1901, he was moving a building along Walker street, which is a street running east and west on the south side of

said city; that an unused telephone wire was stretched across Walker street, belonging to the Julius Andrae & Sons Company, a manufacturing corporation, which wire came from the north and crossed National avenue, another east and west street, one block north of Walker street; that on the north side of National avenue this wire was fastened to a shop building, and on the south side to a bracket upon a pole, and then proceeded along Barclay street south to Walker street; that as this wire crossed National avenue it hung a few inches above an electric light wire heavily charged with electricity, belonging to the Milwaukee Electric Railway & Light Company, protected only with a coating of weather insulation; that the plaintiff was a boy eight years of age, and lived with his parents on the west side of Barclay street, between National avenue and Walker street, and near the latter street, the aforesaid telephone wire passing over the house; that when *Hake* reached this wire the building broke the wire and *Hake* rolled up the north end for some distance in a coil on his arm, and hung the coil on a nail on the south side of the Nagle house, about three and one half to four feet from the ground, and close to a walk used by the family; that this coil remained so hung up till about June 28th, when the plaintiff accidentally touched it as he was standing near the house, and was very severely burned, and received injuries from which he suffered for a long time. It further appeared from the evidence that the wire had sagged down where it crossed National avenue until it rested on the electric light wire, and that the insulation of the latter wire had worn off, so that the telephone wire received the charge of electricity conveyed by the electric light wire. The Julius Andrae & Sons Company was also made defendant originally, but on the trial the action was dismissed as to it.

The jury returned the following special verdict:

"(1) Was *Arthur Nagle,* the plaintiff, injured on June 28, 1901, by receiving an electric shock from a telephone wire left by the defendant, *Hake,* hanging by the side of the house in

which he lived, on Barclay street, in the city of Milwaukee? A. (by the court, by consent of counsel). Yes. (2) Was the plaintiff's injury the natural and probable result of a want of ordinary care on the part of the defendant, *William Hake,* in breaking, coiling up, and hanging said wire by the side of the plaintiff's house on or about June 21, 1901? A. Yes. (3) Ought *William Hake,* as a man of ordinary intelligence and prudence, in the performance of said act, to have foreseen, in the light of the attending circumstances, that he had done something which would be likely to cause a personal injury of some kind to a person near the age of the plaintiff? A. Yes. (4) Ought the defendant, *Hake,* in the exercise of ordinary care and prudence, to have foreseen, in the light of the attending circumstances, that in cutting, breaking, coiling up, and leaving the telephone wire as he did at the time and place and under the attending circumstances, a personal injury might probably and naturally be caused thereby to some person? A. Yes. (5) Did want of ordinary care on the part of the plaintiff's father contribute to produce the injury he received? A. No. (6) Did want of ordinary care on the part of plaintiff's mother contribute to produce the injury he received? A. No. (7) What sum of money will compensate the plaintiff for his injury? A. Twelve hundred and fifty dollars; five hundred dollars to be deducted."

On this verdict the court rendered judgment for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

For the respondent there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *L. A. Olwell.*

WINSLOW, J. The assignments of error are very numerous, and we shall not treat each one separately, but shall endeavor to classify them, and treat each class sufficiently in detail to indicate the conclusions reached on all of the assignments separately.

The alleged errors in refusing to grant a nonsuit, and in refusing to direct a verdict, and in refusing to direct judgment for the defendant notwithstanding the verdict, may all

be considered and disposed of together. It is said that there is no proof of actionable negligence, nor of proximate cause sufficient to take the case to the jury. With this we cannot agree. In the present day it is a well-known fact that our streets are full of electric wires crossing and recrossing each other in every direction, and that some of these wires, especially those transmitting light or heat or power, are charged with deadly currents; and it is also well known that when such a wire is naked, either from having lost its insulation or because necessarily in that condition, like a trolley wire, and comes in contact with another naked wire, the second wire also becomes charged with the current. It requires no college education to know these general facts. Any man actively participating in the affairs of the world, especially in a business which every day necessitates the removal and cutting of such wires, as did the defendant's business, must be presumed to know something of the dangers which lurk ever near the handling of such wires. From the very fact of these known dangers he must necessarily be charged with a higher degree of caution and diligence than one who is dealing with sticks and stones which can convey no such concealed death stroke. As has been said, the defendant was a house mover. His business required the examination and cutting or other disposal of electric wires almost daily. He necessarily must have known something of the dangers lurking about them, and the possibility of contact with a highly charged wire. We think it was certainly for the jury to say whether, in hanging this wire on the side of the Nagle house, within reach of a child, and leaving it there, he was guilty of a negligent act, and an act from which an injury to another was to be anticipated as a natural and probable result.

As stated in the statement of facts, the Julius Andrae & Sons Company was originally joined as defendant in this action on the ground that they were negligent in leaving the unused wire with no one to care for it in the public streets.

It appears that after the trial had proceeded for a day or two the plaintiff discontinued the action as to the Andrae & Sons Company, and the defendant, *Hake,* put the counsel for the Andrae Company on the stand, and examined him as to the circumstances and reasons of the discontinuance. From this examination it appeared that the Andrae & Sons Company paid the father of the infant plaintiff $500, and received a release from the father for the damages claimed *by him* against the Andrae & Sons Company. It further appeared that no release was given by any one on behalf of the plaintiff for damages suffered by him, nor was any money paid or agreement made by or on behalf of the plaintiff for such a release, but the understanding was that this action should be dismissed, as was in fact done. It further appeared that the dismissal was without prejudice, and that there was nothing to prevent another action being begun by the plaintiff against the Julius Andrae & Sons Company. The defendant, *Hake,* was allowed to amend his answer by pleading this alleged settlement as a discharge of all claims against him, and claimed that a verdict should be directed on this ground. The court, however, held that the evidence did not show a settlement of the plaintiff's claim against *Hake,* and instructed the jury that, if they found for the plaintiff, they should deduct the amount paid by the Andrae Company from the amount of the damages found, and this was in fact the course pursued by the jury.

We have been unable to see any error in this; at least any error prejudicial to the appellant. It was competent for the father to settle his own individual claim for damages on account of his son's disablement, and the fact that he does so does not affect the son's separate claim. The evidence did not show that any money was paid to the plaintiff, or to any one on his behalf, on account of his injury, or that any agreement of release, oral or written, was made by the plaintiff, or by any one on his behalf. The understanding that the present action was to be discontinued constituted no release.

It might have been commenced again at once, so far as appears by the evidence. We do not even reach the question of the effect of the release of one of two joint tort-feasors because there has been no attempt made by any one to release the plaintiff's cause of action against either defendant.

Upon the direct examination of the appellant as a witness in his own behalf he stated that the telephone and electric light companies each had a man at the building as he was moving it, who took care of the wires in the street in the way of the building, and either raised them or cut them and put them back again afterwards. He was then asked whether that was the usual custom in moving houses, and also whether, in moving houses, he ever looked after such wires himself; and objections were sustained to both questions. It has not been easy for us to see how the evidence would have been material in any event, but there are very satisfactory answers to the appellant's contention of error on these rulings. As to the first question, the witness had not shown that he knew anything about a general trade custom, and he must show that before he can be heard to testify; and as to the second question, it was only directed to the individual custom of the appellant himself, and this was very clearly incompetent.

A witness named Zarbock, a lineman employed by the Wisconsin Telephone Company, was called as a witness, and testified to examining the wire and its fastenings after the accident, and on cross-examination was asked whether it was fastened to the insulator on the south side of National avenue in the usual way, and an affirmative answer was stricken out. We have been unable to see what substantial bearing this answer would have in the case, or how the striking of it out was in any way prejudicial. The presumption would be, in the absence of any evidence, that it was fastened in the usual way, and this is as far as the answer went.

The appellant testified that Mrs. Nagle was present when he hung the wire on the house, and was then asked whether

she made objection at that time, and the question was ruled out on an objection. It had before appeared that both the father and mother knew that the wire was hanging there before the injury, the mother having testified that she saw *Hake* roll it up, and a few minutes later saw it hanging on the house. The fact of their knowledge of the whole situation is all that is really material on the question of their negligence, and this fact fully appeared. It would not have been made any stronger by showing that no objection was made. Both father and mother were allowed to testify, against objection, that no one told them the wire was dangerous, and that they did not know that it might become dangerous. We see no error in this ruling. If the negligence of the parents is to be imputed to the child (a question which is not decided) it was proper to ascertain what their knowledge was upon the subject of the danger lurking in this wire; not that their statement of ignorance is conclusive, but simply that it is proper to be shown in considering the question of negligence. They may have been negligently ignorant, but this was properly a question for the jury in view of all the facts.

An electrical engineer employed by the Electric Railway & Light Company was allowed, against objection, to answer a number of questions as to the voltage carried by the electric light and trolley wires in Milwaukee, as to the effect of contact between wires, as to the insulation of wires and the absence of guard wires, and other facts tending to show the condition of the various wires in the vicinity at the time of the accident. We are not able to understand how it can be reasonably claimed that there was error in these rulings. The facts thus shown throw light on the general situation and the dangers which were present. Whether the defendant should be charged with knowledge of such dangers, or with negligence in not knowing of them, was a question for the jury.

One of the plaintiff's witnesses who had been called to tes-

tify that the Electric Railway & Light Company maintained a wire on the north side of National avenue covered with what is called "weather proof". insulation was asked on cross-examination whether additional insulation would not be safer, whether there would not be less danger in case of contact with another wire, and whether it was not customary to place guard wires over such wires to prevent contact. Objections to these questions on the ground that they were not proper cross-examination were sustained, and, it seems to us, properly. They did not legitimately bear on anything upon which the witness had been examined in chief.

We shall spend no further time upon rulings on evidence. While there are some other rulings which are complained of, there are none of them of sufficient importance to justify detailed treatment.

The defendant asked that the following instruction be given to the jury, and assigns error on the refusal to give it:

"I further instruct you, that if you are satisfied by the evidence in this case that the acts of the defendant Julius Andrae & Sons Company in leaving the telephone wire in question suspended in the manner they did was the proximate cause, under the definition and instructions already given you on this subject, of the accident to the plaintiff, it is then your duty to answer the question as to whether the acts of the defendant *Hake* were the proximate cause in the negative.

Another instruction of like tenor, except that it referred to the acts of the Milwaukee Electric Railway & Light Company, was also asked and refused, and exception taken. It is probably sufficient to say with regard to these and several kindred instructions that they express simply the converse of a proposition fully given by the court. The court very carefully defined proximate cause, and charged the jury, in effect, that, in order to find that the negligence of *Hake* was the proximate cause they must be satisfied of the necessary facts by a fair preponderance of the evidence; *otherwise* they must answer the question whether the acts of *Hake* were the proximate

cause in the negative. Under the charge no doubt could have been left in the minds of the jury on this proposition, and, such being the fact, it was not error to refuse to give an instruction stating the converse of the proposition.

The court gave the following instruction:

"The defendant, *William Hake,* in breaking, coiling, and hanging the dead or uncharged wire on June 20, 1901, is presumed to have known that it was an electric wire, and to have known and realized the dangerous properties of electricity, and that a higher degree of care was necessary when a thing on account of which an injury may be caused was a highly dangerous one, and that dead electric wires may be enlivened or become charged with a current of electricity by coming in contact with a charged wire, and that in case any person touched or grasped such a wire it would, or might reasonably be expected to endanger the life or limbs of any person touching it."

The appellant claims this instruction to be erroneous because it requires the exercise of more than ordinary care. We do not so understand it, nor do we think the jury could have so understood it. The court had already defined ordinary care as "such care as the mass or majority of mankind exercise under the same or similar circumstances." The sentence now under consideration is elliptical, in that it does not in terms state with what the care required in handling electric wires is to be compared; but we think that none could mistake the idea intended, namely, the idea that greater care is required in handling such agencies which may be charged with mysterious and sudden death than in handling ordinary substances, and this as we have seen is a correct statement of the law.

We have covered all of the assignments of error which seem to us to be of sufficient significance to justify special treatment. We have carefully examined the other points made by appellant, but have found no errors.

By the Court.—Judgment affirmed.

THE STATE VS. BISPING.

October 24—November 15, 1904.

Criminal law: Nature and elements of crime: Statutes: Railroads: Placing obstructions on track: Constitutional law: Excessive and unusual punishments: Information: Immaterial allegations: Surplusage.

1. To constitute an offense under sec. 4386, Stats. 1898 (declaring that any person who shall wilfully, maliciously or wantonly place any obstruction upon the track of any steam, electric or cable railroad in this state, or take up or displace a rail, switch or signal, or remove a spike, or otherwise injure, break down or destroy a bridge, road bed or other structure of such railroad shall be punished, etc.), it is not necessary that the act be one which prevents the safe running of trains or endangers human life.
2. In order to constitute an offense under said sec. 4386, it is not necessary that the obstruction be placed on the track, or that any of the prohibited acts be committed for the purpose of unlawfully, maliciously, and wantonly destroying such railroad.
3. The classification of said sec. 4386, by placing it in the chapter of "offenses against the lives and persons of individuals" does not evince a legislative intent that the element of danger to human life must inhere in any of the acts to make them criminal.
4. The construction of said sec. 4386, above given, does not make the offense a malicious trespass, and therefore said section is not out of harmony and in conflict with secs. 4440, 4440*a*, Stats. 1898, relating to malicious injury to railroad property.
5. Under sec. 4386, Stats. 1898, relating to placing obstructions, etc., upon railroad tracks, and providing a punishment of from one to ten years imprisonment in the state prison, in view of the serious consequences which may flow from the inhibited acts, there is nothing excessive or unusual in the punishment provided, and hence it cannot be said that the statute contemplates that the acts constituting the offense include only such as are necessarily dangerous to human life.
6. An information set out the acts charged in words of substantially the same meaning of those used in sec. 4386, Stats. 1898, but added the allegation: "For the purpose of then and there

unlawfully, maliciously, and wantonly destroying such railroad." *Held*, that the language of the information charged and informed defendant fully of every fact essential to establish the offense without the quoted allegation, which was surplusage, and its insertion in no way misled or prejudiced the defendant.

REPORTED from the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *First, second and fourth questions answered in the negative, the others in the affirmative.*

The defendant was tried in the municipal court of Milwaukee county upon an information alleging that he, on April 5, 1902, "did unlawfully, wilfully, maliciously, and wantonly place an obstruction, to wit, a large stone weighing about fifty pounds, upon the track of the Chicago, Milwaukee & Saint Paul Railway Company, a corporation then and there existing and doing business, which was then and there a steam railroad, *for the purpose of then and there unlawfully, maliciously, and wantonly destroying said railroad,* contrary to the statute," etc. The case was submitted to a jury upon the evidence, who found the defendant guilty of the offense charged. Before any evidence was received, an objection was made to the reception of any evidence, because the information stated no offense under the law. This objection was overruled. After verdict, motions for a new trial and in arrest of judgment were made. Upon defendant's request all proceedings were stayed, and the court certified the following questions:

"(1) Is the offense described in section 4386 of the Revised Statutes of 1898 limited to acts whereby the safe running of trains is prevented and human life endangered?

"(2) Does said section 4386 include the offense of placing an obstruction upon the track of any steam railroad in this state for the purpose of unlawfully, maliciously, and wantonly destroying said railroad?

"(3) Does the information in this case state an offense under the provisions of said section 4386?

"(4) Ought the court to grant the motion in arrest of judgment made by the defendant after verdict?

"(5) Can the court lawfully, upon the information and record hereby certified, proceed to sentence the defendant upon the verdict returned by the jury in this case?"

The cause was submitted for the defendant on the briefs of *Hoyt, Doe, Umbreit & Olwell,* and for the plaintiff on that of the *Attorney General* and *W. D. Corrigan,* second assistant attorney general.

SIEBECKER, J. The court in the first question propounds the inquiry:

"Is the offense described in section 4386 of the Revised Statutes of 1898 limited to acts *whereby the safe running of trains is prevented and human life endangered?*"

The section is as follows:

"Any person who shall wilfully, maliciously or wantonly place any obstruction upon the track of any steam, electric or cable railroad in this state or take up or displace a rail, switch or signal, or remove a spike, or otherwise injure, break down or destroy a bridge, roadbed or other structure of such railroad shall be punished by imprisonment in the state prison not more than ten years nor less than one year."

It is contended that, to constitute an offense as defined in this section by wrongfully placing an obstruction upon the track of a railroad, or in committing any of the other acts enumerated in the section, the act must be charged and found to be *one which prevents the safe running of trains and endangers human life.* Does the offense defined by the section include those elements as claimed? This must be determined from the contents of the statute, by an examination of its terms in view of the purpose the legislature had in mind and which led to the adoption of the law. It is obvious from a reading of this section that the language employed is neither obscure in meaning nor indefinite in its application. Nor is there uncertainty as to what acts come within its provisions. We must be guided in its interpretation by the rule that, "if the words are free from ambiguity and doubt, and ex-

press plainly, clearly, and distinctly the sense of the framers of the instrument (or act), there is no occasion to resort to other means of interpretation." Sutherland, Stat. Const. (1st ed.) p. 312. Reading the statute in its literal sense, it is plain that the legislative intent was to make it an offense for a person wilfully, maliciously, or wantonly to place an obstruction upon a railroad track, and that the offense is committed when this act is done, regardless of any intent which may have prompted him in the matter. The placing of the obstruction on the railroad track, or the doing of any of the other acts forbidden by the statute, constitutes and completes the offense. From this interpretation it must follow that the act complained of need not prevent the safe running of trains or endanger human life to constitute the offense charged. Nor does the offense include as a necessary ingredient that the obstruction be placed on the track or that any of the prohibited acts be committed "for the purpose of unlawfully, maliciously, and wantonly destroying said railroad." The language of the statute does not cover these elements, nor is it necessary to include them by construction to give the statute a reasonable significance and effect.

It is urged that the classification of the statute by placing it in the chapter of "offenses against lives and persons of individuals" evinces a legislative intent that the element of danger to human life must inhere in any of the acts to make them criminal. While classification of statutes by including them in a chapter under a general division of subjects may aid in ascertaining the legislative intent in cases where it is doubtful or uncertain, it cannot be held to overcome the obvious meaning of the language employed. Nor do we find any force in the contention that this interpretation of the section makes the offense in its character a malicious trespass, and therefore leaves it out of harmony and in conflict with sections 4440 and 4440*a*, Stats. 1898. A comparison of this

section with the other sections cited reveals the fact that they cover different acts though they come within analogous fields.

It is also asserted that the degree of punishment prescribed by the section in question indicates that when the statute was framed it was contemplated that the acts constituting the offense should include only such as were necessarily dangerous to human life. We perceive nothing excessive or unusual in the punishment to be inflicted for the offense, in view of the serious consequences which may flow from the inhibited acts.

The third question certified is:

"Does the information filed . . . state an offense under the provisions of section 4386?"

The information sets out the acts charged in words of substantially the same meaning as those used in the statute, but adds the allegation: "For the purpose of then and there unlawfully, maliciously, and wantonly destroying said railroad." It is urged that this allegation is material in charging the offense to show that the particular offense charged related to an injury to property which was at the time in use for railroad purposes. We think the language employed charges and informs defendant fully of every fact essential to establish the offense without this allegation, which thus becomes surplusage. *State v. Siegel,* 54 Wis. 86, 11 N. W. 435. The allegation is wholly immaterial to the charge, and its insertion could in no way mislead or prejudice the defendant. The general rule is that surplusage does not vitiate the information, and should be stricken out unless it be so interwoven with material allegations that it cannot be so stricken out without carrying with it material parts of the charge. The allegation is in no way combined with or made a part of a material one, and therefore it may be disregarded, and rejected as surplusage. *Commonweath v. Dyer,* 128 Mass. 70.

The motion in arrest of judgment should be denied, and

the court should proceed to sentence. Nothing remains to be said in answering the questions certified.

By the Court.—The first, second, and fourth questions are answered in the negative, and the third and fifth questions are answered in the affirmative.

JOHN O'BRIEN LUMBER COMPANY, Respondent, vs. WILKINSON and another, Appellants.

November 15—December 13, 1904.

Pleading: Amendment: Abuse of discretion: Custom: Local and general usage: Judicial notice: Presumptions: Evidence: Examination of witnesses: Res adjudicata: *Demurrer* ore tenus: *Chattel mortgages: Appeal and error.*

1. Under the facts stated in the opinion, it is *held* that it was not an abuse of discretion to refuse to allow a counterclaim to be amended so as to allege a local custom.
2. Particular usages and customs of trade or business must be known by the party to be affected by them, or they will not be binding, unless they are so notorious, universal, and well established that his knowledge of them will be conclusively presumed.
3. A general usage and custom need not be pleaded, since courts take judicial notice thereof, and such general usage and custom is presumed to have entered into a contract affected by it and to bind the parties.
4. Evidence of a general usage and custom is allowed, not only to explain, but also to add tacitly implied incidents to the contract actually made in addition to those which are actually expressed. It has, however, very remote, if any, bearing in establishing a different contract, which, if made, through mistake was never reduced to writing.
5. Where a witness has testified that he did not know whether W., one of defendants, knew he had a certain contract or not, it is not error to exclude a question as to whether witness had any reason to believe that one G. had spoken to W. about that contract. Such testimony is at most conjectural

6. It is not error to sustain a demurrer *ore tenus* to a counterclaim, which had already been held by the supreme court to state no cause of action in favor of defendants and against the plaintiff.
7. Where a mortgagee of chattels has taken possession after default, the mortgagor has no longer any legal title to the property. He cannot maintain replevin therefor, nor, without proof of payment or other extinguishment of the debt, can he maintain an action against the mortgagee for conversion. His only remedy is by a bill in equity to redeem.
8. Even if a sale of mortgaged chattels be not made in strict conformity with the requirements of sec. 2316*a*, Stats. 1898 (providing that no such sale shall be made before five days from the actual taking, etc., and if made without consent of the mortgagor, that "the mortgage debt shall be deemed paid and the mortgage securing the same be deemed cancelled"), such sale does not operate as a cancellation of the mortgage debt in the sense that the mortgagor is entitled to recover the property, or its value, without regard to the amount remaining due on the mortgage.
9. Defendants counterclaimed for the balance due on the sale and delivery of a locomotive, which the undisputed evidence showed had been mortgaged to plaintiff to secure the repayment of certain advances made to defendants on a logging contract. The locomotive was thereafter sold by the mortgagee at public sale to a third person for less than the debt. The debt for which the mortgage was given had not been paid. *Held*, that it was not error to refuse an amendment to the counterclaim alleging that plaintiff had appropriated and converted the proceeds to its own use.
10. Error cannot be assigned to the admission of testimony which was afterwards stricken out and the jury instructed to disregard.
11. Evidence being admissible, when offered, as tending to prove an issue raised by the pleadings, it is not prejudicial error to fail to restrict the consideration of such evidence to that purpose, where no specific objection was made on that ground, nor request to so restrict the consideration thereof.
12. Error in admission of evidence under a claim of offset to a counterclaim, if any, is immaterial, where such claim of offset was withdrawn and the jury found no cause of action existed under the counterclaim.

SIEBECKER, J., dissents.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This action was commenced June 15, 1901, to recover some $20,000 claimed to be due on two notes, one dated November 18, 1899, for $6,000, and the other June 30, 1900, for $8,701.23, and for a balance on account of $11,442.70. Such claims grew out of four logging contracts between the plaintiff and the defendants, dated, respectively, May 2, 1898, February 6, 1899, December 1, 1899, and August 2, 1900. The original answer admitted, in effect, the claims set forth in the complaint, but sought to reduce the amount by six several counterclaims. By the first counterclaim the defendants claim $16,500 damages by reason of an alleged breach of the contract of May 2, 1898, on the part of the plaintiff, in failing to furnish cars as agreed. By the second counterclaim the defendants claim $19,000 damages by reason of the alleged breach of contract of February 6, 1899, in failing to furnish cars as therein alleged. By the third counterclaim the defendants claim $10,500 damages by reason of the alleged breach of contract of December 1, 1899, in failing to furnish cars as therein alleged. By the fourth counterclaim the defendants claim $5,000 damages by reason of the alleged breach of the contract of August 2, 1900, for failing to furnish cars as therein alleged. By the fifth counterclaim and setoff the defendants claim $706.13 as the balance due for certain work in and about the grading of the railroad bed between Benton and Washburn. By the sixth counterclaim and set-off the defendants claim $3,300 as the balance due on the sale and delivery of a certain locomotive, known as "Lima Engine," to the plaintiff by the defendants, November 21, 1901, of the reasonable value of $3,800, no part of which had been paid except $500. The plaintiff replied to the fourth, fifth, and sixth counterclaims. To each of the first three counterclaims the plaintiff interposed written demurrers. The trial court sustained each of such demurrers to the first, second, and third counterclaims, and entered an order accordingly, September 11, 1902. From that order the de-

fendants appealed to this court, and the same was affirmed, April 17, 1903. 117 Wis. 468–475, 94 N. W. 337. In deciding that case, this court there reached the conclusion that the written contracts, upon their face, by necessary implicaion, imposed upon the defendants the duty of obtaining the cars upon which they had agreed to load the logs, and therefore failed to support any cause of action in favor of the defendants and against the plaintiff, as alleged in such counterclaims. 117 Wis. 474, 94 N. W. 337.

After the cause was remanded to the trial court, the defendants amended their answer in several particulars. Among other things, the first, second, and third counterclaims were each amended so as to allege, in effect, that, by mutual mistake of the parties in each of said written contracts, the duty of furnishing and supplying cars was imposed upon the defendants instead of the plaintiff, as had been actually agreed between the parties, and the same was put in issue by the replies of the plaintiff. An order to show cause, based upon an affidavit of the defendants' attorney, was made January 18, 1904, and a proposed amendment to each of the first, second, and third counterclaims mentioned, by alleging therein the following:

"That the expression 'to put and load on cars,' as used in the sixth line of the second paragraph of said Exhibit A, and whenever else used in said exhibit and agreement and the other exhibits attached to the complaint and answer, with reference to the logging to be done thereunder, had, at and for a long time prior to the making of such agreement, a well-known, recognized, and established meaning under the general custom of the business in the locality in which such contract was executed, and in the locality and neighborhood in which the same was to be and was carried out; that such recognized and established meaning was well known to each of the parties thereto at the time of entering into said agreement, and such expression was so used by the said party in said agreement in and with such established and recognized meaning. That by such general custom, usage, and interpretation

said expression implied, embraced, and included the furnishing by the owner of the logs, and not by the logger, all cars so to be loaded, and was uniformly used and understood as the equivalent of the expression 'to put and load on cars to be furnished by the owner of the logs.' "

And that the prayer of said answer be amended to read as follows:

"Wherefore these defendants pray that said contracts mentioned in the first, second, and third counterclaims be reformed to express the real intention and agreement of the parties as in said counterclaims set out, if the court shall find that such reformation is necessary for the purpose of expressing such intention and agreement, and that the said defendants have judgment against the plaintiff for the full amounts respectively set forth and claimed in the several counterclaims contained in said answer, and for their costs and disbursements in this action."

Thereupon, and after hearing on February 15, 1904, the court "ordered that the said motions of the defendants be, and the same hereby are, denied, with $10 costs. It is further ordered that the equitable issues raised by the first three counterclaims contained in the amended answer of the defendants, whereby the defendants seek to reform the three contracts mentioned and described in the said first three counterclaims of said answer, be first tried by the court before the trial of the legal issues in the above-entitled action, and that such equitable issues be tried, as aforesaid, at the term of said court which will be held at the courthouse in the city of Ashland on the 29th day of February, 1904." March 7, 1904, the venue in the action was changed to Eau Claire county. Such equitable issues were tried April 11, 1904, and the court made written findings, wherein it was found, in effect, that nothing was omitted from or left out of either of said contracts by mistake or otherwise, and that each of such contracts fully expressed the agreement therein sought to be made.

Thereupon, and on May 2, 1904, the case was tried, upon

the complaint, the answers as so amended, and the replies thereto, by the court and a jury. At the close of the trial the jury returned a verdict wherein they found in favor of the plaintiff, and against the defendants, as to the fourth counterclaim, and that the defendants had no cause of action thereon against the plaintiff. And they also returned a verdict wherein they found in favor of the defendants, and against the plaintiff, as to the fifth counterclaim, and assessed the defendants' damages at $968.68. The court withdrew from the jury all consideration of the issues raised by the sixth counterclaim and the reply thereto, and the evidence introduced under such counterclaim, and refused to permit such counterclaim to be amended. From the judgment entered upon such findings and verdict, the defendants bring this appeal.

For the appellants there was a brief by *Tomkins, Tomkins & Garvin,* attorneys, and *F. M. Hoyt* and *T. W. Spence,* of counsel, and a reply brief signed *F. M. Hoyt* and *T. W. Spence,* of counsel, and oral argument by *Mr. Hoyt* and *Mr. Spence.*

For the respondent there was a brief by *Richard Sleight,* attorney, and *Winkler, Flanders, Smith, Bottum & Fawsett,* of counsel, and oral argument by *Mr. Sleight* and *Mr. J. G. Flanders.*

CASSODAY, C. J. 1. The first question calling for consideration is as to whether it was an abuse of discretion for the trial court to refuse to allow the first, second, and third counterclaims, respectively, to be amended, so as to allege that, by the custom in the locality and neighborhood where the contracts were made and to be performed, the expression "to put and load on cars," contained therein, "was uniformly used and understood as the equivalent . . . 'to put and load on cars *to be furnished by the owner of the logs,*'" as mentioned in the foregoing statement. For the purpose of this

appeal we assume that such proposed amendment only embraced a local custom. Such refusal was contained in the order of February 15, 1904, mentioned in such statement. Whether it was an abuse of discretion, of course, depends upon the circumstances. The action was commenced two years and eight months prior to the making of the order so complained of. The original complaint was verified July 19, 1901. The defendants answered, and thereupon the plaintiff served an amended complaint October 14, 1901. The defendants answered such amended complaint November 6, 1901, and therein alleged six several counterclaims. November 29, 1901, the plaintiff replied to such counterclaims. March 10, 1902, the defendants amended their answer to the amended complaint. April 2, 1902, the plaintiff replied to the fourth, fifth, and sixth counterclaims, and April 7, 1902, the plaintiff amended such reply. April 23, 1902, the plaintiff demurred to the first, second, and third counterclaims. September 11, 1902, the trial court sustained such demurrers, and from the order sustaining the same the defendants appealed to this court, where the order was affirmed April 17, 1903. 117 Wis. 468, 475. August 29, 1903, the defendants again amended their answer, setting up an equitable counterclaim to the effect that each of such contracts was by mutual mistake so written as to impose upon the defendants the duty of furnishing and supplying the cars, instead of being so written as to impose such duty upon the plaintiff, as had been actually agreed between the parties, as mentioned in the foregoing statement; and November 10, 1903, an order was entered to the effect that such amended answer stand as the answer of the defendants in the case, and that the plaintiff have twenty days to reply to the same. November 30, 1903, the plaintiff replied to such counterclaims. Under such circumstances, and upon such proposed amendment to the answer alleging such local custom, and upon an affidavit of one of the attorneys, for the defendants, having the principal charge of the action,

wherein it was stated that the facts set forth in such proposed amendment were first disclosed to him December 22, 1903, while preparing for trial, and that, while such facts were apparently known to the defendants, yet they were unaware of their significance and bearing upon the merits of the action, the court refused to allow such amendment. Thus it appears that, before attempting to inject into the case the element of local custom, the defendants had remodeled their answer three different times, and the last time was several months after this court had affirmed the order of the trial court holding, on demurrer, that neither the first, second, nor third counterclaim stated a cause of action in favor of the defendants and against the plaintiff. We fail to find in the record any good excuse for such delay of nine months after such affirmance, and sixteen months after the entry of the order so affirmed, before attempting to allege local custom. It is conceded that the defendants knew of such local custom at the time of the making of such several contracts. In fact, to be available in construing such contracts, it was essential that both parties, at the time of making such contracts, had knowledge of such local custom. This, when properly pleaded, may be shown by proof of actual knowledge, or that such custom has been so general that the parties are presumed to have knowledge of it. 12 Cyc. 1039, 1040. Thus it is said:

"Particular usages and customs of trade or business must be known by the party to be affected by them, or they will not be binding, unless they are so notorious, universal, and well established that his knowledge of them will be conclusively presumed." Id. 1041, 1042. See *Power v. Kane,* 5 Wis. 265; *Scott v. Whitney,* 41 Wis. 504; *Hinton v. Coleman,* 45 Wis. 165; *Hewitt v. John Week L. Co.* 77 Wis. 548, 46 N. W. 822; *Brunnell v. Hudson S. M. Co.* 86 Wis. 587, 57 N. W. 364; *Chateaugay O. & Iron Co. v. Blake,* 144 U. S. 476, 12 Sup. Ct. 731.

We must assume, therefore, that the defendants had knowledge of such local custom, if any existed, during all the in-

tervening years after the making of the several contracts, and the attempt to allege it, and yet the case had been pending for more than two years and a half before there was any attempt to allege such local custom. Certainly, the allowance or disallowance of such an amendment was addressed to the sound discretion of the trial court. *Milwaukee & M. R. Co. v. Finney,* 10 Wis. 388; *Studebaker Bros. Mfg. Co. v. Langson,* 89 Wis. 200–203, 61 N. W. 773. We cannot hold that there was an abuse of discretion in refusing to allow such amendment.

2. Error is assigned because, on the trial of the equitable issue made by the reply to the counterclaim alleging mutual mistake in the making of the contracts, the court excluded testimony tending to prove a general and uniform custom for the owner of the logs to furnish the cars. No such custom was alleged in such counterclaims. But "a general usage or custom need not be pleaded." 12 Cyc. 1097. The reason is, courts take judicial notice of such general custom. Id. 1098. *Vogt v. Shienebeck,* 122 Wis. 491, 100 N. W. 820. Such general custom may be presumed to have entered into the contract and bind the parties. *Gehl v. Milwaukee P. Co.* 105 Wis. 573–580, 81 N. W. 666; *S. C.* 116 Wis. 263, 93 N. W. 26. As there said in the opinion of the court in that case, on the first appeal:

"A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed; for the reason that the majority of such transactions are had in view of the custom, and the agreement on which the minds of the parties actually met will thereby be carried into effect. Jones, Construction of Cont. §§ 100, 103. Where the custom is proved to be known to both, it may even add terms to the contract. *Scott v. Whitney,* 41 Wis. 504; *Hewitt v. John Week L. Co.* 77 Wis. 548 [46 N. W. 822]."

So it is said that "evidence of usage is allowed not only to explain, but to add tacitly implied incidents to the contract

in addition to those which are actually expressed." 12 Cyc. 1082—citing numerous cases in support of the proposition, including the one last mentioned, and *Lamb v. Klaus,* 30 Wis. 94. In this last case the plaintiff sought to recover the purchase price of shingles sold and delivered to the defendant under a written contract. By way of equitable counterclaim, the defendant sought to reform the written agreement on the ground of mistake in making the same. That issue was first tried and determined against the defendant, and such determination was not presented to this court for review. The answer further alleged, and evidence was offered tending to prove by practical construction and general custom and usage, that the defendant was entitled to interest on advances made by him on such written contract; but the court excluded the evidence so offered, and for that reason the judgment was reversed by this court. *Lamb v. Klaus,* 30 Wis. 94, 95, 102. This court held that, by refusing to reform the written contract, the trial court in effect held "that the written contract expressed all that the parties *meant to express therein,*" and that it did "not estop either party from proving a usage which entered into the agreement." In other words, and as indicated in the opinion of DIXON, C. J., in that case, and the other authorities cited, evidence of general custom and usage is admissible to explain and enlarge the meaning of a written contract actually made, but has a very remote, if any, bearing in establishing a different contract, which, if made through mistake was never reduced to writing. Assuming the existence of such general custom and usage, still we are constrained to hold that the findings of the trial court upon the equitable issues, to the effect that nothing was omitted from or left out of either of the three written contracts in question by mistake, are sustained by the evidence. Certainly we cannot hold that such findings are against the clear preponderance of the evidence.

3. Error is assigned because, while attempting to prove on

cross-examination of the plaintiff's president, O'Brien, that at the time of making the first contract with the defendants, May 2, 1898, the defendant *Wilkinson* knew of the contract which the plaintiff had made with the railroad company about two weeks before, and after testifying, without objection, that he did not know whether *Wilkinson* knew he had that contract or not; that he never mentioned it to him, and never knew that any one mentioned it to him, but "presumed that maybe Gifford did"—which words in quotation were stricken out by the court. Gifford had, at the time, charge of the plaintiff's office in Ashland, but had since died. Then, after testifying, without objection, that he did not know what Gifford had done, the court sustained an objection to a question as to whether he had any reason to believe that Gifford spoke to *Wilkinson* about the contract with the railroad company. We perceive no error in such rulings. Such testimony was at most conjectural.

4. Error is assigned because the court sustained the demurrer *ore tenus* to each of the first three counterclaims. These counterclaims and the contracts therein alleged, and upon which they were respectively based, are the same as when this court affirmed the order of the trial court sustaining the demurrers to such counterclaims on the ground that neither of them stated facts sufficient to constitute a cause of action in favor of the defendants and against the plaintiff. 117 Wis. 468–475, 94 N. W. 337. Every question decided by this court on that appeal is *res adjudicata,* and absolutely binding, not only upon the trial court, but also upon this court. *Keystone L. Co. v. Kolman,* 103 Wis. 300, 303, 79 N. W. 224, and cases there cited; *Hart v. Moulton,* 104 Wis. 349, 353, 80 N. W. 599; *Rupiper v. Calloway,* 105 Wis. 4, 7, 8, 80 N. W. 916; *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443, 81 N. W. 675; *McCord v. Hill,* 117 Wis. 306, 308, 94 N. W. 65. Since the decision on the former appeal is *res adjudicata,* it is unnecessary to determine whether

that decision would have been different had the reasons here urged been there presented. Since it was there held that neither of the three counterclaims stated facts sufficient to constitute a cause of action in favor of the defendants and against the plaintiff, it is obvious that no evidence under either of those counterclaims was admissible against the objections on behalf of the plaintiff. As indicated in some of the authorities cited on another branch of this case, that included evidence of practical construction and general custom. We must hold that there was no error in sustaining such demurrers *ore tenus.*

5. Error is assigned because the court withdrew from the jury the issues raised by the reply to the sixth counterclaim. That counterclaim was to recover $3,300 as the balance due on the sale and delivery to the plaintiff by the defendants of a locomotive engine, and refusing to permit such counterclaim to be amended upon the trial. It is undisputed that, to secure the repayment of $1,774.34 advanced by the plaintiff for the benefit of the defendants, they gave to the plaintiff a bill of sale for the engine, October 21, 1899, which was in legal effect a chattel mortgage; that, pursuant to notice posted in two places, the engine was sold thereon by the plaintiff to the Edward Hines Lumber Company, November 21, 1901, for less than the amount due on such mortgage. The trial court held that, if the sale was fair, the defendants had no cause of action therefor; and that if such sale was unfair, yet that, as the debt secured by the engine was due, and the plaintiff had taken possession prior to the sale, the legal title passed to the plaintiff, as mortgagee, and the only remedy of the defendants was in equity to redeem. In such ruling the court followed the decision of this court, wherein it was held:

"Where the mortgagee of chattels has taken possession after a default, the mortgagor has no longer any legal title to the property, and cannot maintain replevin therefor. His only remedy is by a bill in equity to redeem." *Holzhausen v.*

Parkhill, 85 Wis. 446, 55 N. W. 892. To the same effect, *Klinkert v. Fulton, S. & M. Co.* 113 Wis. 493, 501, 89 N. W. 507, and cases there cited.

Nor can the "mortgagor, without proof of payment or other extinguishment of the mortgage, maintain an action against the mortgagee for a conversion of the property." *Hill v. Merriman,* 72 Wis. 483, 40 N. W. 399. The engine was not sold at private sale, but on public notice, as stated. Assuming that the sale was not made in strict conformity to the statute (sec. 2316*a,* Stats. 1898), still it did "not operate as a cancellation of the mortgage debt in the sense that the mortgagor is entitled to recover the property or its value without regard to the amount remaining due on the mortgage." *Gauche v. Milbrath,* 94 Wis. 674, 69 N. W. 999. See *Vreeland v. Waddell,* 93 Wis. 107, 67 N. W. 51. It follows from what has been said that there was no error in refusing to allow the counterclaim in question to be amended on the trial, so as to allege that the plaintiff appropriated and converted the proceeds of such sale to its own use.

6. The error assigned in admitting testimony of the train dispatcher, Downs, as to cars being returned partially loaded, on the ground that it was hearsay, seems to be unfounded, since such testimony was stricken out and the jury instructed to disregard it. Error is assigned in permitting Clark, the assistant manager of the railroad, and Wilcox, the treasurer of the railroad, to testify as to claims made by the railroad against the plaintiff for difference in freight between the actual weight of the cars, as loaded, and the minimum load of the cars stipulated for in the railroad contract, and claims therefor against the plaintiff, and as to the receipt of bills therefor. Such evidence was admitted under the contract of August 2, 1900, upon which the fourth counterclaim was based. In that contract the plaintiff agreed in terms to furnish the cars. The evidence was offered in support of the offset pleaded in the reply to that counterclaim, and seems to

have been admissible for that purpose. The argument is that it was inadmissible to prove that sufficient cars were furnished to the defendants. But no specific objection was made upon that ground, nor was the court requested to restrict the consideration of such evidence to the offset so pleaded in the reply. Since the evidence was admissible, when offered, as tending to prove such offset, the error, if any, is in failing to restrict the consideration of such evidence to that purpose. Under the circumstances mentioned, we must hold that the admission of such testimony was not reversible error. *Tebo v. Augusta,* 90 Wis. 405, 407, 408, 63 N. W. 1045; *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585, 27 N. W. 348; *Cayon v. Dwelling House Ins. Co.* 68 Wis. 510, 32 N. W. 540; *Erdall v. Atwood,* 79 Wis. 1, 6, 47 N. W. 1124. Especially is this so since the plaintiff at the close of the trial, and before the case was submitted to the jury, withdrew its claim of offset to the fourth counterclaim, and the jury found that the defendants had no cause of action under that counterclaim.

By the Court.—The judgment of the circuit court is affirmed.

SIEBECKER, J., dissents.

FIRST NATIONAL BANK OF MILWAUKEE, Respondent, vs. BUETOW, imp., Appellant.

November 15—December 13, 1904.

Fraud: Evidence: Appeal and error: Findings: Conclusiveness.

1. **To set aside a written instrument on the ground of fraud, the evidence of the fraud must be clear and satisfactory.**
2. **To set aside the findings made by a trial court, they must appear to be contrary to the clear preponderance of the evidence.**

3. In an action on a written guaranty alleged to have been obtained by fraud, upon the evidence, stated in the opinion, the findings of the trial court upon the issue of fraud are *held* not to be against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to recover on a guaranty wherein defendant *Charles J. L. Buetow* and others in due form jointly and severally agreed to pay or cause to be paid to plaintiff all loans, drafts, notes, interest, demands and liabilities of every kind and description, which, when such guaranty was made, were, or thereafter might be due or owing by the Suhm Leather Company to plaintiff upon the same or any part thereof becoming due, waiving all proceedings to collect from the principal debtor or any one else, and also demand, notice and protest of every kind, and agreeing that the obligee, without notice, might surrender or release securities held by it and grant extensions of time, and from time to time renew any obligations of said principal without notice.

The indebtedness alleged in the complaint to fall within the obligations of, and enforceable under, such guaranty was $9,000, of principal and the interest thereon, evidenced by a promissory note of $5,000, and a like note for $4,000. Defendant answered and among other things counterclaimed to the effect that when the guaranty was executed he was an indorser to plaintiff on a $3,000 note of said leather company; that he was unable to read the guaranty and understand it without assistance, which was known to plaintiff's cashier, and that he signed the same relying upon representations made by such cashier that the effect thereof was merely to permit plaintiff and the maker of such note to renew it from time to time within one year without obtaining his indorsement thereon in order to preserve his liability for the payment of the indebtedness; that when asked to sign the guaranty he requested time to examine it and for permission to take the

same away for that purpose, but that he was persuaded not to insist thereon and to sign the paper at once by the representations aforesaid.

The counterclaim was duly replied to. The issue thus formed was deemed to be triable by the court and was so tried, the result being a decision in favor of the plaintiff.

Other issues raised by the answer were then tried before a jury resulting in a verdict for plaintiff for $10,433.34. Thereon judgment was rendered from which defendant *Buetow* appealed.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *Charles S. Carter.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. P. Miller.*

MARSHALL, J. The sole question presented on this appeal is, does the evidence warrant the finding that appellant was not wrongfully persuaded by respondent's cashier to sign the guaranty? On that two well-known rules are to be observed, viz.: To set aside a written instrument on the ground of fraud, the evidence of the fraud must be clear and satisfactory. In order to set aside findings of fact made by a trial court, they must appear to be contrary to the clear preponderance of the evidence. After carefully studying the record before us the view prevails that the findings cannot be disturbed. The testimony bearing thereon was mainly given by appellant and respondent's cashier. The former emphatically supported the material allegations of his counterclaim. He gave as an excuse for not reading the paper before signing it that he did not have his glasses with him and could not read understandingly without them. He gave as an excuse for not having some one not adversely interested to him read the paper for his benefit, or take time to otherwise understand it that the cashier persuaded him not to delay as it was important to conclude the matter presently. On those points appel-

lant was corroborated to some extent by one of his associate guarantors. There was some evidence given by him upon cross-examination to the effect that on a former occasion he gave testimony indicating that he read the instrument sufficiently to get some idea of its meaning. The cashier denied appellant stated that he could not read the paper, or desired to take it home for the purpose of reading it, or anything about signing it to be good for a year. He further testified that he explained the instrument fully to the appellant; that he did not read it to him, but gave it to him for examination; that he said to him, "We are having a lot of trouble from time to time getting indorsements on new paper and new notes and the guaranty will avoid all trouble of getting indorsements. It takes the place of indorsements." To which he replied, " 'All right,' and signed it." There was some evidence to the effect that one of appellant's associate guarantors stood by during the conversation between appellant and respondent's cashier; that no effort was made by appellant to have such associate explain the paper; that the latter understood its import and that neither he nor the other associate guarantor made any defense to the action. The words "new note," which counsel for appellant urges upon our attention as involving an admission by appellant's cashier that only renewals of the $3,000 note were in contemplation when the paper was signed, have been considered. The circumstance of their use is quite persuasive in support of appellant's position. However, there stands the positive evidence of the cashier that he fully explained the paper to appellant, some evidence that the latter took the paper into his hands for examination and to some extent, at least, read it; the fact that the meaning of the paper would be obvious to any person exercising ordinary care in examining it; the fact that one of the guarantors stood by, where, if he were paying any attention to the matter, he might have heard what occurred, though there was evidence that he did not hear the same; the fact that

appellant had ample opportunity to have the instrument explained to him by one of his associates and did not secure such explanation; the fact that the other associate guarantors understood the paper, as is indicated by their making no defense thereto, the improbability that the cashier committed such a barefaced fraud as is claimed, and other circumstances appearing in the evidence, which, in the whole, preclude holding that the findings on the issue as to fraud are against the clear preponderance of the evidence. Therefore the judgment appealed from must be affirmed.

By the Court.—So ordered.

SCHOOL DISTRICT NO. 9, TOWN OF LAKE, Respondent, vs. SCHOOL DISTRICT NO. 5, TOWN OF LAKE, Appellant.

November 16—December 13, 1904.

Appeal and error: Questions reviewed: Schools and school districts: Contracts: Evidence.

1. Where a question is not presented by the pleadings, nor litigated on the trial, the refusal of the trial court to determine such question is affirmed.
2. On the trial of the issues raised by a counterclaim, it appeared, among other things, that defendant's officers prepared and signed an instrument embodying the terms of a contract as they claimed it had been agreed upon, but which, when presented to plaintiff's officers, was unqualifiedly rejected upon the ground that no such agreement had been made; that there had been conferences between the officers of the respective parties, where terms had been discussed and settled upon in a provisional way, but that such understanding had not been consummated by the parties entering into a contract. *Held*, that a finding of the trial court that the counterclaim was not supported by evidence was sustained by the record.

APPEAL from a judgment of superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action wherein plaintiff seeks to recover a part of the money raised by taxation for school purposes before the territory of plaintiff district was set off from the territory of defendant district in 1901. The case was before this court on appeal, and is reported in 118 Wis. 233, 95 N. W. 148, where the facts constituting the grounds of complaint are fully stated. The answer admits the facts concerning the formation of plaintiff district, the raising of the money by taxation before the order creating the plaintiff district went into effect, and the withholding of the money, but denies liability to plaintiff for any part of the same.

After the cause was returned to the trial court, defendant was granted leave to amend its answer by alleging two counterclaims: First, that a large number of children of the plaintiff district, from the time of the separation of the districts, attended the school of defendant, until some time in the month of February, 1902, and that defendant had expenses in excess of those necessarily incurred in providing schools for pupils in its district for this period, and it demands payment therefor; second, defendant alleged that an agreement was duly made between the districts, through their officers, that the school children in plaintiff's district should attend school in defendant's district from the beginning to the end of the school year in 1902, that plaintiff district was to pay therefor a sum stipulated and fixed in the agreement, and that such children did attend the school until the early part of February, 1902, and then, without any fault on defendant's part, refused to longer continue in defendant's school, and that defendant was willing and prepared to have them continue in its school, and demands recovery for the sum so agreed to be paid.

Plaintiff denied the allegations of the counterclaims. A trial was had before the court without a jury. The court found the fact of the organization of the plaintiff district and all other facts as alleged in the complaint, and awarded

a recovery for the amount demanded. Upon the issues raised by the counterclaims, it found that no liability was established in favor of defendant. Judgment was granted plaintiff for the amount due it, with interest and costs. This is an appeal from such judgment.

For the appellant the cause was submitted on the brief of *Wheeler & Perry.*

For the respondent there was a brief by *Bow & Ferguson,* and oral argument by *O. W. Bow.*

SIEBECKER, J. The trial court found that plaintiff, as an organized district set off from the territory of defendant district, was entitled to recover the amount sued for. On the former appeal to this court, defendant's demurrer to the complaint was overruled, and is reported in 118 Wis. 233, 95 N. W. 148. After the case was returned to the trial court, defendant amended its answer by counterclaiming upon two grounds. By the first counterclaim defendant alleged that it incurred expense in excess of the amount required to maintain its school for the accommodation and instruction of the school children residing within its district, on account of the attendance of children from the plaintiff district at such school from the month of September, 1901, to the month of February, 1902. It appears that most of the children of school age residing in plaintiff district did so attend the defendant's school, but the evidence does not establish that any additional expense was incurred on account thereof. It is contended, however, that since plaintiff district was not separated from defendant and become fully organized as a school district until the month of December, 1901, it is liable for a part of the cost of maintenance of defendant's school; but we find no such claim presented by the pleadings, and no claim of this nature was litigated upon the trial of the case. Under these conditions we think the trial court properly refused to determine this question.

By the second counterclaim it is alleged that the members of the boards of the two districts met, under authority and direction of their respective districts, and agreed that the school children of the plaintiff district should attend the school maintained by defendant for the school year of 1901 and 1902, and that plaintiff should pay one half the expense of its maintenance, which it is alleged amounted to $1,012.50. It is argued that this agreement was consummated between the parties, and that defendant provided for the attendance of plaintiff's school children for the year, and that plaintiff refused to comply with the arrangement after February 4, 1902. An examination of the evidence shows that conferences were had by the members of the respective boards, and that terms for such an agreement were discussed, and were in fact settled upon in a provisional way, but such understanding was not consummated by the parties entering into a contract. It also appears that a written instrument was prepared and signed by defendant's officers, embodying terms which they claimed had been agreed upon, but when it was presented to plaintiff's officers for signature it was unqualifiedly rejected, upon the ground that no such agreement had been made. No further steps were thereafter taken to consummate an arrangement as originally contemplated by the parties. We must hold that the conclusion of the trial court, to the effect that defendant's counterclaims are not supported by the evidence, is sustained by the record.

By the Court.—Judgment affirmed.

WILLIAMS, Respondent, vs. WILLOCK, Appellant.

November 16—December 13, 1904.

Officers: Clerks of court: Fees: Action to recover.

Where a circuit court action is dismissed for want of prosecution, the clerk of that court is entitled to recover his fees for services necessary for entry of judgment from the party for whose benefit they were rendered; although the clerk omitted to exercise the right given him by sec. 748, Stats. 1898, authorizing him to require his fees to be paid in advance for any services in the action.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *B. E. Van Keuren,* and for the respondent on that of *Williams & Williams.*

CASSODAY, C. J. It appears from the record that an action was commenced by one Zahler against this defendant in the circuit court for Winnebago county; that the venue was changed to Fond du Lac county; that the plaintiff herein was at the time the clerk of the circuit court for that county; that, when the cause was reached in its order for trial, it was, on motion of the defendant, dismissed for want of prosecution, and judgment was thereupon entered accordingly; that subsequently the plaintiff herein made out his itemized bill for clerk's fees in that action, amounting in the aggregate to $6.25, of which sum $2 was paid by Zahler for filing papers at his request. The balance of $4.25 the plaintiff requested the defendant to pay, but he refused to do so. Thereupon the plaintiff commenced this action to recover the same, before a justice of the peace, and in his complaint alleged that such services were rendered at the request of the defendant in the sum last mentioned, according to such itemized bill thereunto

annexed, with the credit for the amount paid by Zahler, as mentioned. The defendant answered to the effect that the plaintiff herein, as such clerk, did not, before the entry of judgment, require the defendant to pay such fees, and did not demand payment thereof until a short time prior to the commencement of this action, and that the defendant never agreed or promised to pay such fees or any part thereof. Upon the trial before the justice, the plaintiff herein recovered judgment for $3.75 damages, and costs. From that judgment the defendant appealed to the county court of Winnebago county, and that court, after hearing the parties, affirmed the judgment of the justice, with costs, and directed the clerk of that court to enter judgment accordingly. From the judgment so entered, the defendant brings this appeal.

The judgment so affirmed only covered items of clerk's fees prescribed by the statute. Sec. 747, Stats. 1898. That section provides that "the clerks of the several circuit courts shall be entitled to the" fees therein prescribed, "and no more." *St. Croix Co. v. Webster,* 111 Wis. 270, 87 N. W. 302. The mere fact that the plaintiff, as such clerk, did not exercise his right given by the statute to "require his fees to be paid in advance for any services" in the action, did not bar him from recovering pay for his services from the party for whose benefit they were rendered. Sec. 748, Stats. 1898. His duty to perform the services, in the absence of such requirement, continued the same as though he had been paid in advance. *Lang v. Menasha P. Co.* 119 Wis. 1, 6, 96 N. W. 393. We perceive no reason why the party for whose benefit the services were rendered should not be liable therefor. The defendant's proceedings in the action and the dismissal of the same, and the entering of judgment thereon in his favor, made it the duty of the plaintiff, as such clerk, to perform the services for which he recovered judgment.

It is claimed that there was an understanding or agreement between the plaintiff and the defendant to the effect that the

defendant should only pay the plaintiff's fees in full in case he succeeded in collecting the judgment. It is enough to say that we find no sufficient evidence in the record to establish any such agreement.

By the Court.—The judgment of the county court of Winnebago county is affirmed.

SCHMIDT, Appellant, vs. SCHMIDT'S ESTATE, Respondent.

November 16—December 13, 1904.

Estates of decedents: Claims: Advancements: Parol evidence.

Plaintiff filed as a claim against his son's estate, a plain, unambiguous promissory note. The answer alleged that at the time of the pretended execution of the note the plaintiff gave his deceased son the face of the note as an advancement, and that the note was only evidence of such gift or advancement. *Held,* that parol evidence tending to prove the allegations of the answer was inadmissible, both under sec. 3959, Stats. 1898, providing that parol evidence is inadmissible to prove an advancement, and also because it tended to contradict the plain terms of an unambiguous written contract.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This was a claim made by a father against the estate of his deceased son, upon a promissory note for $1,000, alleged to have been executed by the son January 30, 1900, payable to the order of the plaintiff ten years after date, with interest. The claim was filed in the county court, setting forth a copy of the note, and alleging that the money was loaned to be used, and in fact was used, by the deceased in purchasing a certain eighty-acre tract of land, the description of which was set out at length. The claim was disallowed in the county court May 21, 1902, and the plaintiff appealed to the circuit court, after

which appeal the defendant answered, denying the execution of the note, and alleging that at the time of the pretended execution of the note the plaintiff gave to his deceased son and other of his children $1,000 each as advancements out of his estate, and that, if the note in question was ever signed, it was not intended as an evidence of indebtedness, but only as evidence of a gift or advancement. The case was tried before the court, trial by jury being waived. The note itself was not produced, but evidence was introduced showing that it was offered in evidence in the county court and had not been since seen. Parol evidence was received, against objection, tending to show that the transaction was an advancement only, and not a loan of money, and the court found that it was an advancement, and that the note was executed only as evidence of an advancement, and should be canceled. Thereupon judgment was entered dismissing the complaint, and the plaintiff appeals.

For the appellant there was a brief by *Jos. Roemer* and *H. C. Sloan,* and oral argument by *Mr. Sloan.*

For the respondent there was a brief by *Pierce & Lehr,* and oral argument by *J. E. Lehr.*

WINSLOW, J. The admission of parol evidence tending to show that the sum named in the note in question was an advancement from the father's estate was error, for two reasons: *First.* Under our statute (sec. 3959, Stats. 1898) parol evidence is inadmissible to prove an advancement. *Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430. *Second.* Irrespective of this question, it was inadmissible because it tended to contradict and set at naught the plain terms of an unambiguous written contract.

If it was claimed that the note was executed by mistake, and did not express the intent of the parties, this fact could only be proven when properly alleged by an equitable counterclaim. *Casgrain v. Milwaukee Co.* 81 Wis. 113, 51 N. W. 88.

It seems to be admitted in both briefs that one of the objects sought by the plaintiff was to establish a vendor's lien upon the land purchased by the deceased in favor of the plaintiff, and it is suggested in respondent's brief that forty acres of the land purchased constituted the homestead of the deceased. As this question has not been tried, and the testimony on the question is at best of a fragmentary character, we shall not attempt to decide it, but shall send the case back for a new trial, when this question, if it arises, can be satisfactorily tried. In so doing it is not improper to call attention to the fact that no formal complaint asking for such relief appears in the record, and also the fact that this court has held that sec. 2271, Stats. 1898, which provides that the homestead shall descend free from all judgments and claims against the deceased owners with certain exceptions, abrogates the right to a vendor's lien thereon. *Berger v. Berger,* 104 Wis. 282, 80 N. W. 585.

By the Court.—Judgment reversed, and action remanded for a new trial.

RIDEOUT and another, Administrators, Respondents, vs. WINNEBAGO TRACTION COMPANY, Appellant.

November 16—December 13, 1904.

"Negligence": "Gross negligence": Pleading: Indefiniteness: Uncertainty: Evidence: Election of remedies: Appeal and error: Instruction to jury: Special verdict: Inconsistent findings: Judgments.

1. The term "negligence" by itself suggests only inadvertence or want of ordinary care, and however great may be the degree of such want of care, so long as the element of inadvertence remains, willfulness is excluded.
2. The term "gross negligence" signifies willfulness. It involves intent, actual or constructive, which is a characteristic of

criminal liability. If one is guilty of inadvertence causing injury to another, that one's fault is denominated want of ordinary care. If one is guilty of willful misconduct causing actionable injury to another, the former's fault is denominated "gross negligence."

3. Since in the first case suggested intention to do the injury, actual or constructive, must be absent and in the second case present, a complaint using language to describe defendant's fault appropriate to both species of misconduct, as if they occurred at one and the same time, and that one included the other, is indefinite and uncertain.
4. Gross negligence does not include ordinary negligence, and proof of the former does not prove but rather disproves the latter.
5. Where a complaint is indefinite and uncertain because of the pleader's confusing the element of advertence with that of inadvertence, ordinary negligence with gross negligence, and the attention of the trial court is called thereto, though not in the most approved manner, it should compel the plaintiff to proceed upon one theory or the other, if both theories can be reasonably spelled out of the pleadings, or give such permissible construction to the pleadings as to confine plaintiff's claim to one species of wrongdoing.
6. Where a complaint has a double aspect rendering it indefinite and uncertain, as above indicated, it is error to submit the cause to the jury upon both aspects, and in case error is committed in that regard resulting in a verdict in favor of the plaintiff upon the ground of gross negligence and ordinary negligence as well, it is error to render judgment thereon because of inconsistency in the findings.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action for damages for the alleged wrongful killing of plaintiff's intestate. The circumstances stated as a ground for a recovery are substantially these: From June 22, 1897, up to and inclusive of the event complained of defendant was a corporation duly organized under the laws of this state, and authorized to operate an electric street railway on various streets, including Merritt street, in the city of Oshkosh, Wisconsin. August 24, 1903, the Uniformed Rank, Knights of

Pythias in such city, some being on foot and some being in carriages,—one of the former being Christian Sarau,—marched in parade formation along the street specially mentioned, escorted by a military band of twenty-four pieces discoursing music. Some of the marchers, including Sarau, in the exercise of ordinary care walked between the rails of defendant's track located on such street, and others walked on either side thereof. While so doing defendant's servant with one of its cars approached the procession from the rear at a dangerous rate of speed, without giving any sufficient warning to the marchers to yield the right of way before reaching them. The car going at such dangerous rate of speed, without sufficient warning being given as aforesaid, was carelessly, negligently, recklessly and wantonly propelled into the space occupied by the marchers and on to and over said Sarau, causing injuries from which he on the same day died.

Sarau suffered great mental and physical pain from the instant he was injured till death occurred, and plaintiffs as his personal representatives were put to great expense by reason of such wrongful conduct for medical and surgical care of and attendance upon Sarau, and for nursing and hospital bills.

Several times in the complaint the conduct of the defendant's servant, who controlled the car, was characterized as careless, negligent, reckless, wilful and wanton, or by words of similar import. Allegations were made appropriate to a cause of action for damages to Sarau, which survived to his personal representatives, and also a cause of action for damages to his surviving relatives, the whole amount claimed being $10,000.

Defendant answered putting in issue the allegations of the complaint as to its servant having negligently operated the car on the occasion in question, and pleaded as the proximate cause of the injury and death of Sarau,—want of ordinary care on his part.

It fairly appears from the record, in harmony with the claim of respondents' attorneys upon the argument of the case in this court, that respondents' right to recover was intended to be grounded on gross negligence. The court, nevertheless, refused to construe the complaint in harmony therewith, and submitted the cause to the jury for specific findings covering the subject of liability for ordinary negligence, and for gross negligence as well. The result was the following verdict:

(1) Sarau came to his death by injuries received at the time and place alleged in the complaint. (2) Defendant's employees were guilty of want of ordinary care and prudence in operating the car at the time of the accident. (3) Such want of ordinary care and prudence was the proximate cause of the injury to Sarau. (4) The motorman was guilty of gross negligence; his conduct was malicious, wanton and reckless, evincing a disregard of consequences to others. (5) The car was going at a speed of fifteen miles an hour when it ran through the band, before it reached Sarau. (6) He could not have seen the car approaching him in time to have avoided the collision. (7) The motorman did not try to stop the car upon its becoming apparent to him that it would strike Sarau. (8) When the accident occurred the car was running at the rate of fifteen miles an hour. (9) Want of ordinary care on Sarau's part did not contribute to produce the injury. (10) Damages were caused by the occurrence, for doctors' bills and hospital bill, $75, funeral expense $421, physical pain and mental suffering of Sarau $500, loss to his surviving relatives by his death $4,500.

After the coming in of the verdict the court changed finding 6 so as to decide that Sarau could have seen the approaching car in time to have avoided the collision.

Exceptions were duly taken to preserve for review numerous questions, including those discussed in the opinion, so far as exceptions were necessary in that regard. Judgment

was rendered in plaintiff's favor on the verdict, from which this appeal was taken.

For the appellant there were briefs by *Weed & Hollister*, attorneys, and *Charles Barber*, of counsel, and oral argument by *Mr. H. I. Weed* and *Mr. Barber*.

For the respondents there were briefs by *Bouck & Hilton* and *A. E. Thompson*, and oral argument by *Mr. John F. Kluwin* and *Mr. Thompson*.

MARSHALL, J. It seems that from the time of drawing the complaint to the entry of judgment there was want of appreciation of the broad distinction between ordinary negligence and intentional wrongdoing, the former being characterized by inadvertence and the latter by advertence, the one requiring intent, actual or constructive to injure, and the other being inconsistent therewith. Under the decisions of this court, and by the better rule, it is believed, prevailing whenever the doctrine of comparative negligence does not prevail, as it does not here, that species of wrong, which has been denominated in this and some other jurisdictions gross negligence, is impossible if there is mere want of ordinary care. Therefore to charge that an alleged wrongdoer was guilty of one species of wrongful conduct, and allow a recovery for guilt of the other, or to charge both as characterizing the same wrongful act and allow a general recovery is wrong. A pleading with such an infirmity is indefinite and uncertain and open to a motion on that ground. The practice of charging that one caused injury to another by careless, negligent, wanton and wilful misconduct, or of using language of similar import in attempting to state a cause of action is improper. This court so held, in effect, in *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446, and cases there referred to, and so held expressly in *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536. In the former this language was used:

"Inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence," That involves "a sufficient degree of intent at least to be inconsistent with inadvertence."

In the last case cited this court said of the effect of the decision in the *Bolin Case* as to a wrong of this nature (one alleged to have been characterized by wantonness and willfulness):

"There is really no element of inadvertence, which is a necessary element of negligence, and hence the term 'gross negligence,' as applicable to this class of wrongs, is inaccurate. The conclusion is that when this kind of wrong is charged, as in the present case, though it be called 'gross negligence,' it does not logically include ordinary negligence any more than a charge of ordinary negligence includes intentional wrong."

In *Decker v. McSorley,* 116 Wis. 643, 93 N. W. 808, it was said that:

"No degree of mere carelessness or inadvertence constitutes gross negligence or willful misconduct."

And in *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663, that:

"It is obvious that no degree of mere carelessness or inadvertence, however remote from the care customarily used either by the ordinary careful man or by the exceptionally careless one, constitutes gross negligence." The latter suggests necessarily intent, either actual or constructive, to cause injury, or "conduct evincing a total disregard for the safety of persons or property."

The doctrine above indicated is not supported by authorities universally, though the want of harmony will be generally found to grow out of the fact that the doctrine of comparative negligence prevails in some jurisdictions and not in others. Authorities on both sides of the question are cited in

Wilson v. Chippewa Valley E. R. Co., supra. The idea that gross negligence is inconsistent with ordinary negligence seems to be the logical result of such a distinction between the two species of wrongs as to render it impossible for the element of inadvertence to be common in both. It were better if the term "gross negligence" as suggesting inadvertence had never been used in speaking of a wrong, having the element of intent, actual or constructive, to injure. The supreme court of Indiana in treating this subject in *Louisville, N. A. & C. R. Co. v. Bryan,* 107 Ind. 51, 53, 7 N. E. 807, 808, used this language:

"To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi*-criminal. . . . The words 'careless' and 'negligent' used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and willful conduct of another, is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. . . . It is only necessary to say that the distinction between cases falling within the one class or the other, is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other."

In *Cleveland, C., C. & St. L. R. Co. v. Miller,* 149 Ind. 490–501, 49 N. E. 445, 449, that court said:

"The two terms ('negligence' and 'willfulness') are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness. . . . The doctrine of comparative negligence does not obtain recognition in this state . . . and when willfulness

is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence. Willfulness and negligence are the opposites of each other; the former signifying the presence of intention and the latter its absence."

To the same effect are *Parker v. Pennsylvania Co.* 134 Ind. 673, 34 N. E. 504; *Highland A. & B. Railroad Co. v. Winn,* 93 Ala. 306, 9 South. 509; *Louisville & N. R. Co. v. Johnston,* 79 Ala. 436; *Levin v. M. & C. R. Co.* 109 Ala. 332, 19 South. 395; *Wabash R. Co. v. Speer,* 156 Ill. 244, 40 N. E. 835; *Ruter v. Foy,* 46 Iowa, 132; *Matthews v. Warner's Adm'r,* 29 Grat. 570; *Denman v. Johnston,* 85 Mich. 387, 48 N. W. 565; *Menger v. Laur,* 55 N. J. Law, 205, 26 Atl. 180; and 7 Am. & Eng. Ency. of Law (2d ed.) 443. From the foregoing it will be seen that in charging liability, either springing from the want of ordinary care or an intentional wrong, causing personal injury to one, nothing is to be gained by a multiplicity of adjectives or adverbs. When it is stated that the wrongdoer failed to exercise ordinary care in a case grounded on ordinary negligence, or that he acted willfully in a case based on gross negligence, so called, nothing in any circumstances can be added by otherwise characterizing the wrong, except by way of emphasis, which of course is immaterial to the liability, or the measure thereof. In confusing the two species of wrong, as if one was of the same character as the other, only greater in degree, there is liability of rendering the pleading indefinite and leading to a fatal variance between it and the proof and also to an inconsistent verdict.

There was an objection here to any evidence under the complaint because of uncertainty of the nature above spoken of. The theory of appellant's counsel seems to have been then, and to be still, that the charge of inadvertent conduct and of willfulness neutralized each other, rendering the complaint insufficient to state any cause of action. We think otherwise.

In a case of this kind, while it is true a charge of gross negligence will not warrant a recovery on the ground of ordinary negligence, even though accompanied by an allegation that plaintiff was in exercise of ordinary care at the time of the occurrence complained of, it does not necessarily follow that a charge including both elements of wrongful conduct is meaningless. If very strict technical rules of pleading were applied it might be otherwise. Under the proper rule every reasonable intendment is to be considered in favor of the pleading and everything essential to the cause of action sought to be stated, reasonably inferable from the language used, is to be deemed as effectually pleaded as if expressly alleged. Sec. 2668, Stats. 1898; *Morse v. Gilman,* 16 Wis. 504; *Flanders v. McVickar,* 7 Wis. 372; *Horn v. Ludington,* 28 Wis. 81; *Merrill v. Merrill,* 53 Wis. 522, 10 N. W. 684; *Miller v. Bayer,* 94 Wis. 123–126, 68 N. W. 869; *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230, 72 N. W. 749. Or as stated thus in some of the cases cited:

"If the essential facts can be gathered from the pleading or may reasonably be inferred from the allegations it is good though such allegations be in form uncertain and incomplete."

It is considered that a charge that an act was negligently, carelessly and willfully done, or done negligently, carelessly and in disregard of consequences as to the personal safety of others, though open to a motion to make more definite and certain by removing the feature rendering it necessary to determine by construction what character of wrong is relied upon may reasonably be said to charge gross negligence. Therefore the objection to evidence under the complaint was properly overruled. However, since the objection directed attention to a probability that the pleader may have intended to charge both ordinary negligence and gross negligence, to set forth two causes of action of a somewhat inconsistent character, the court in overruling it should have con-

strued the complaint, and shaped the trial accordingly. In *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536, this court construed a complaint charging an alleged wrongful act to have been perpetrated negligently and willfully as stating a cause of action involving gross negligence, and tested the sufficiency of the verdict thereby, holding, that upon such complaint there cannot be a recovery on the ground of ordinary negligence, consistent with *McClellan v. Chippewa Valley E. R. Co.* 110 Wis. 326, 85 N. W. 1018, where it was decided that in a complaint charging ordinary negligence there can be no recovery on the ground of gross negligence.

The practice adopted here of declining to construe the complaint as to the particular species of wrongdoing intended to be charged therein and confining plaintiff thereto, and permitting a recovery upon the ground of ordinary and gross negligence as well, is very reprehensible. To allow such a practice to gain a foothold in our system would lead to prejudicial confusion and uncertainty in the administration of justice. The jury were directed to find as to issues appropriate to two distinct and somewhat inconsistent causes of action, when the complaint should have been construed as charging but one. It should have been held to state a cause of action for gross negligence. We have a verdict finding that degree of wrong, and in effect finding that a lesser degree was the proximate cause of the injury. It may appear somewhat technical to hold that such a verdict presents a well-defined and fatal inconsistency, but the practice contemplated by the Code that the plaintiff shall state, understandingly to the defendant and the court, the facts as to the cause of action he relies upon, and if there are two causes that they shall not be inconsistent, and that the recovery shall be in harmony therewith, is so invaded by that adopted by the trial court that we feel constrained to condemn it, not overlooking sec. 2829, and the scope thereof, as declared by this

court, in saving judicial decisions from disturbance regardless of errors not affecting the substantial rights of the adverse parties.

Since no recovery can be sustained under the complaint for ordinary negligence, all questions presented upon the appeal, appertaining to the subject of contributory negligence of Sarau, are immaterial and will therefore not be considered. If the injury was caused by gross misconduct of appellant's servant, conduct involving at least constructive intent to do the act complained of, whether Sarau did or did not exercise ordinary care to protect himself does not affect the right of respondents to recover, either for the damages caused to the deceased or to the surviving relatives. *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446.

The point is made that there was no evidence of willful misconduct on the part of appellant's servant, who controlled the car, and therefore a verdict should have been directed in appellant's favor. It seems to us otherwise. There was evidence tending to show that when the car reached a point where the motorman was in full view of the marchers, and for a considerable period of time thereafter, he must have observed the danger those in its pathway were in and had ample opportunity to guard against it; that he must have seen that the marchers were proceeding entirely unconscious of the approach of his car; that with the noise of the band and other noises made by them it was quite improbable that they would, or might not, observe the car in time to give way for it to pass; that by repeated signals from the conductor he was directed to slacken the speed of the car, and if necessary stop it before reaching the space occupied by the marchers, and that, nevertheless, he made no effort to do so until it had traveled through a large part of such space and up to within a few feet of Sarau, at the rate of fifteen miles per hour, or about twenty-two feet per second. A jury might well find under such circumstances conscious disregard of human life,

rendering the wrongdoer in case of a destruction thereof guilty of manslaughter in a criminal action, and of willful misconduct in a civil action. True, the car had the right of way and it was the duty of the marchers to step aside so as not to interfere with its passage or speed. True, it was the duty of the marchers, as is ordinarily the case, to use their senses reasonably, to enable them to do that before the car came dangerously near them, and yet no excuse is seen for an assertion of a superior right in appellant by consciously running its car into the parade at a speed of twenty-two feet per second.

A person with Sarau at the place of the injury when he regained consciousness in answer to this question, "What did he say if anything that would indicate pain and suffering?" said:

"He raised his right leg, at that time he knew he was hurt and he didn't know whether his leg was off or whether it was cut although he felt the pain and he thought they were either squeezing it or doing something to it and he wanted us to let go, seeing we didn't let go he raised his right leg and tried to kick us and we held his right leg down."

It is easily seen that the answer is not responsive to the question. Error is assigned because the court refused to strike it out. Whether appellant was, or may have been, prejudiced thereby does not clearly appear. As a rule unresponsive answers by a witness should be promptly stricken out, upon a motion being seasonably made therefor. The orderly conduct of trials requires that litigants shall have a reasonable enforcement of that rule.

Several witnesses were permitted to testify to what they heard Sarau say, or do, or how he acted shortly after he was injured, some of the occurrences being while he was on the way to the hospital from the place of the injury, and some immediately upon, or soon after, his arrival at the hospital, indicating that he was conscious and suffering pain. That

was proper. Exclamations and expressions such as commonly, under the circumstances, evince suffering, the conditions being such as to indicate reality, may be testified to by a person having knowledge thereof upon the ultimate fact which they suggest becoming a proper subject of inquiry. Such evidence falls within the rules allowing all parts of the *res gestæ* as to a subject of judicial inquiry to be given in evidence. *Hall v. American M. A. Asso.* 86 Wis. 518, 57 N. W. 366; *McKeigue v. Janesville,* 68 Wis. 50, 31 N. W. 298; *Quaife v. C. & N. W. R. Co.* 48 Wis. 513, 4 N. W. 658; 1 Greenl. Evidence, § 102, and Jones, Evidence, § 252. The doctrine that a person's state of mind as to existing pain can be so established necessarily includes establishing consciousness. Both matters were material in this case. One could not readily suffer pain without possessing some degree of consciousness. The indications of one would ordinarily evince the other. But independently of that, doubtless, the state of a person's mind as regards consciousness, when material, may be established by the species of evidence competent to establish the fact of suffering pain.

Evidence was permitted as to what the duties of a motorman were, operating a car manned by a conductor, as in this case. The question was evidently not aimed at what the duty of the motorman was, as a matter of law, but as to what the incidents of his position were in that regard under the contract of employment. Presumably, the purpose of the question was to show that he was not required to do anything interfering with observing the situation of those upon the track in the pathway of his car on the occasion in question, and that he recklessly and consciously disobeyed the conductor's orders to stop the car before the event complained of. The bearing of the evidence was on the claim of willful misconduct imputable to appellant. In that light we see no reason why the evidence was not proper.

Further complaint is made because evidence was permitted

as to the schedule time for running cars the week before the accident. We are unable to see how appellant could possibly have been prejudiced by that. There was no claim that the speed of the car on the day of the accident was greater than usual. The only difference in the schedule on that day and on the week prior thereto, was that on the former, contrary to the latter, the cars were operated one way only, giving patrons the benefit of two opportunities to go in that direction in the time ordinarily occupied by a trip down the track and return. It was certainly proper to show the manner in which cars were operated at the time of the injury, and that there was a special arrangement for the occasion for the better convenience of patrons.

Error is assigned because one, who was in the procession some distance behind Sarau, was permitted to testify that as the car passed him, he said "For God's sake stop that car!" It was then in dangerous proximity to Sarau. The exclamation was made within hearing distance of the motorman. He may, or may not, have heard it. It was within the probabilities that he did. So the evidence, though not competent to show the speed of the car, or that it was going at a dangerous rate of speed, was competent as bearing on the question of whether the motorman operated the car in conscious disregard of the safety of others.

One of the marchers, who was some distance behind Sarau, having testified, without objection, that seeing the danger to those on the car track, he stepped forward to take hold of some of them, his idea being to run on to the track for that purpose, but that there was no show and he stepped back, was permitted to answer a question as to why there was no show. The answer was not strictly responsive thereto, but there was no motion to strike it out. The question merely asked for an explanation of previous evidence. No reason is suggested, or is perceived, why that was not proper. A number of other

rulings on evidence adverse to appellant are referred to in the briefs of counsel. We have given such attention thereto as seems to be required without discovering any prejudicial error therein.

Complaint is made because the court did not submit the following questions to the jury, as requested: "Did the motorman sound the gong continuously while approaching Sarau?" "At what rate of speed was the car running when it ran into the Milwaukee Uniformed Rank, Knights of Pythias?" It is a sufficient answer thereto to say that the questions only involve evidentiary circumstances, not issues of fact raised by the pleadings, within the meaning of sec. 2858, Stats. 1898; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; and *Patnode v. Westenhaver,* 114 Wis. 460, 90 N. W. 467. There is no allegation in the complaint or the answer as to whether the gong of the car was continuously sounded while the car was approaching Sarau, or at what rate of speed it was going at the time of the injury. The allegations of the complaint are to the effect that it was then moving at a dangerous rate of speed, and that due and sufficient warning was not given to persons in the pathway thereof to give way for its passage. These allegations were put in issue by denials, and in addition defendant answered that as the car approached the point where the injury was inflicted, a sufficient warning of its presence was given by sounding the gong and bell on the car. So the real issue raised was whether the car, under the circumstances, was approaching at a negligent rate of speed, and whether sufficient warning was given to persons in its pathway to clear the track for its passage. These matters were, though not in the most approved form, included in the questions submitted.

Error is assigned because the court refused to instruct the jury that had Sarau lived his earning capacity would prob-

ably have decreased with advancing years. It would seem that appellant could not have been prejudiced by a failure to instruct on such a matter of common knowledge.

Further error is assigned for a refusal to instruct the jury that the probable earning capacity of Sarau should be considered with reference to his capacity in that regard, taking into consideration his personal expenses, income from property not being considered. The general instructions so informed the jury. That being the case there was no error in refusing to specially instruct as to the same matter.

Some complaint is made of remarks by respondents' counsel during the argument to the jury, which do not appear to merit special attention. The exceptions in regard thereto have been sufficiently examined to satisfy us that at least no prejudicial error was committed in respect to such matters.

The judgment must be reversed and the action remanded for a new trial of the cause of action for gross negligence, it being understood that the issues appropriate thereto are the only ones which the complaint justifies submitting to a jury for determination. It is unfortunate that a verdict was taken, which in effect found that such a wrong produced the death of Sarau, and that it was also produced by a wrong of an entirely different character.

By the Court.—The judgment appealed from is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

WISCONSIN CENTRAL RAILWAY COMPANY, Respondent, vs. PHŒNIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.

November 17—December 13, 1904.

Fire insurance: Agents: Employment to procure insurance: Authority of agent: Cancellation of policy: Evidence.

1. An insurance agent may be the agent of the assured in procuring insurance, but, when a conflict of duties arises, his authority to act for the assured must yield to his duty as agent for the insurance company imposed by sec. 1977, Stats. 1898.
2. Where an agent is employed to procure insurance, such employment, in itself, does not authorize him to represent the assured for the purpose of receiving notice of cancellation of subsisting insurance, and to substitute other insurance in place of the insurance sought to be cancelled.
3. Where an insurance agent procures insurance for the owner by applying to another agent to write it, without any direction from the assured to the latter, the agent receiving the order from the assured, by force of sec. 1977, Stats. 1898, is the agent of the company issuing the insurance.
4. In an action on insurance policies issued by defendant's agent at the request of F. & L., insurance brokers to whom plaintiff had applied for insurance, it appeared, among other things, that the defendant's agent attempted to cancel such policies and substitute others. Under the evidence stated in the opinion, it is *held* that F. & L. had no express or apparent authority from plaintiff to represent it and to receive notice of cancellation of policies, or to procure and accept new insurance in place of the subsisting policies ordered cancelled by defendant.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

An action upon two policies, issued by the defendant insurance company to plaintiff, upon shingles of plaintiff at Menasha, Wisconsin. One policy bears date January 31, 1903, for $2,500, and the other, February 7, 1903, for $1,000. It appears that the insurance was effected by Furlong & Leedom, who were engaged in the insurance business in the city of Milwaukee at the time these policies were

issued, and had conducted a business as insurance brokers for a considerable period prior to this time. At the time of this transaction and for some time prior thereto, Thos. H. Gill had been the general attorney of plaintiff, and had had general charge of plaintiff's insurance business. He requested Furlong & Leedom, on the 31st of January, 1903, to place insurance on shingles in plaintiff's possession for transit at Menasha, Wisconsin, to the amount of $64,000. A part of the insurance was placed by Furlong & Leedom in companies they represented, but the greater portion of it they requested Fieweger & Co., who did a local insurance business at Menasha, to place in companies represented by them. Among the policies they issued were the two policies sued on—one for the amount of $2,500, under date of January 31, 1903; and another for the amount of $1,000, under date of February 7, 1903. These policies were in the form of the Wisconsin standard fire insurance policy, insuring plaintiff against loss on these shingles for a year. The policies were sent to Furlong & Leedom by Fieweger & Co., and were delivered to Mr. Gill for plaintiff, and he had possession of them at the time of the fire, which occurred at the hour of 10:45 a. m. of February 19, 1903. After the policies were reported as issued by Fieweger & Co., some of the companies directed Fieweger & Co. to cancel policies, because they did not wish to carry this risk. In carrying out these instructions for cancellation, Fieweger & Co. made the usual entries in their office books of policies issued, noting the direction to cancel, and they then substituted policies of other companies for the amount canceled, and they then communicated by letter with Furlong & Leedom, informing them that they were directed to cancel the policies designated, and inclosing the substituted policies. Upon receipt of such letters and policies, Furlong & Leedom made entries upon their office record to the effect that letters with substituted policies had been received, and that the original policies were ordered canceled, and there-

after they called upon Mr. Gill to apprise him of the substitution, and to demand an exchange, delivering the substituted policies, and receiving the original policies from him. On February 17, 1903, Fieweger & Co. wrote Furlong & Leedom, inclosing several policies, as substitutes for the two policies in suit and others which they had been directed to cancel. This letter, with inclosures, reached Furlong & Leedom on the morning of February 18th, and they immediately made the usual entries of receipt and cancellation in their office books, sought telephone communication with Mr. Gill concerning the transaction on the 19th of February, but could not reach him on account of his absence from the city of Milwaukee. On the 20th of February, Mr. Leedom called at Mr. Gill's office, informed him of the communication from Fieweger & Co. received by his firm on the 18th of February, tendered him the substituted policies, and demanded return of those for which the substitutes were offered. Mr. Gill refused to receive the policies then tendered him, and refused to deliver those demanded of him, stating that he knew of no policies covering the loss aside from those in his possession. No formal notice of cancellation under the provisions of the policies is claimed to have been given. The court found that Furlong & Leedom had no express authority from plaintiff to cancel any of its policies, and that no substitution of any of its policies was effected, and that the usual course of conducting the business of insurance conferred no authority on Furlong & Leedom to cancel policies. To effect a substitution, policies had to be delivered to Mr. Gill, be approved and accepted by him, and those for which the substitutes were offered had to be surrendered by him. It appeared that Furlong & Leedom received separate orders from Mr. Gill when plaintiff wished to place any insurance through their agency, and that they received their compensation by way of commissions on policies issued by companies they represented and by division of the commissions on

the policies written by the local agent. Mr. Gill testifies that he gave no express orders to Furlong & Leedom to keep the line of insurance so ordered by him up to the full amount, either in the case of these shingles or at any other time, and that he at no time, gave them express authority to cancel or substitute policies. This statement is corroborated by the agent's testimony. Proof of loss was made by plaintiff to defendant under the policies in suit. Defendant denied liability. The court found defendant liable under the policies, and awarded judgment for the amount due thereon in plaintiff's favor. Defendant appeals from the judgment.

For the appellant there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. H. Noyes.*

M. C. Phillips, of counsel, for the respondent.

SIEBECKER, J. Upon the foregoing statement of facts of the case the circuit court held that Furlong & Leedom were not the agents of the plaintiff to receive notice to cancel subsisting insurance, and held that the policies sued on were in force at the time of the fire. It is strenuously insisted by the defendant that the facts and circumstances show that Furlong & Leedom had authority from the plaintiff to receive notice to cancel subsisting policies and procure substituted insurance to keep up the full line of insurance originally ordered. An insurance agent may be the agent of the assured in procuring insurance, if his duties as such agent do not conflict with his duties as agent of the insurance company, under sec. 1977, Stats. 1898; but when a conflict of duties arises his authority to act for the assured must yield to that imposed by this statute. *Schauer v. Queen Ins. Co.* 88 Wis. 561, 60 N. W. 994; *John R. Davis L. Co. v. Hartford Ins. Co.* 95 Wis. 226, 70 N. W. 84; *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227. It is also well established that, where an agent is employed to procure insurance, such employment, in itself, does not authorize him to represent the

assured to receive notice of cancellation of subsisting insurance and to substitute other insurance in place of the insurance sought to be canceled. *Body v. Hartford Ins. Co.* 63 Wis. 157, 23 N. W. 132; *Wicks Bros. v. Scottish U. & N. Ins. Co.* 107 Wis. 606, 83 N. W. 781. The facts of the *Body Case* correspond to those of the instant case as to the manner of procuring insurance through an agent applying to another agency to write it. There, as here, the application was made to an agency, which placed the insurance through another, without a direction from the assured to the latter. Under such circumstances the agency receiving the order from the assured are, under sec. 1977, Stats. 1898, the agents of the insurance company issuing the insurance. The question, then, is, do the facts and circumstances proven in the case show that Furlong & Leedom had express or apparent authority from plaintiff to act for it in receiving notice to cancel subsisting policies? The record discloses that both Mr. Gill and Mr. Leedom testified on the subject of express authority, and denied that any was ever given or received. We find no other evidence directly on this subject, and must therefore conclude that plaintiff gave no such authority to Furlong & Leedom by express direction.

It is contended that the policies sued on had been terminated by the issuance and delivery of substituted insurance by Furlong & Leedom, upon the ground that the course of business as conducted between them amounted to giving authority to cancel subsisting insurance and substituting other policies. This is predicated upon the claim that whenever these agents received notice of cancellation of any insurance they made an office record of such notice, and made entries on their office books declaring such policies canceled and others substituted as of the time and under the date of the original policy, and they thereupon delivered such substituted policies to Mr. Gill, by whom they were received in place of the canceled policies. It is also claimed that this course of conduct

ing the business was a direction to the agents to keep up the line of insurance to the full amount; and that this was done by them, it is claimed, is evidenced by the way they made substitution whenever directions to cancel policies came to their notice. We cannot assent to these contentions. It seems to us that the findings of the trial court against this view are abundantly supported by the evidence. It is shown without contradiction that Mr. Gill gave specific direction on each occasion when ordering insurance to be placed, as to the amount, and no policy was ever accepted unless he approved of the company issuing it, and the amount for and the terms upon which it was written. It also appears that he retained possession of the policies, and that, when apprised of the fact that insurance was ordered canceled, he would determine whether the policies held by him were to be surrendered, whether the insurance was to be kept up to the original amount, and whether the substituted policies were to be accepted. Nor did Messrs. Furlong & Leedom receive their compensation from plaintiff. Whatever compensation they received was paid directly by the companies, or was received by them by a division of the commission with the local agents. Furthermore, every order for insurance given them seems to have been undertaken and executed as a separate and distinct employment in procuring insurance and receiving payment of premiums. Under these facts and circumstances it must be held that Furlong & Leedom had no express or apparent authority from plaintiff to represent it and to receive notice of cancellation of policies, or to procure and accept new insurance in place of subsisting policies ordered canceled. Their duties, under the orders of Mr. Gill, were performed and completed when the policies first issued were delivered to him. Policies could be terminated only in conformity to their stipulation, or by agreement with him as the company's representative. Their employment and the course of conducting the business in procuring the insurance for plaintiff

gave them no authority to receive notice of or to consent to cancellation, nor were they authorized to keep up the insurance to the amount originally ordered. Similar transactions were considered by the courts in the following cases, and like conclusions reached: *White v. Ins. Co. of N. Y.* 93 Fed. 161; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 3 Sup. Ct. 207; *Buick v. Mechanics' Ins. Co.* 103 Mich. 75, 61 N. W. 337; *Stebbins v. Lancashire Ins. Co.* 60 N. H. 65. The findings of the trial court are fully sustained by the evidence, and must be affirmed.

By the Court.—Judgment affirmed.

RUEPING, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

November 18—December 13, 1904.

Railroads: Negligence: Personal injuries: **Res adjudicata: *Damages.***

1. **A decision of the supreme court as to the *quantum* of damages recoverable on a given state of facts is *res adjudicata*, where there is no material difference between the evidence in the second trial and that on the first, as to the loss plaintiff has suffered, or will suffer, resulting from his injury.**
2. **Plaintiff, forty-five years of age, whose business was mainly office work, suffered a compound fracture of the tibia about two and one-half inches below the knee, accompanied by a simple fracture of the fibula. He was skilfully treated, and progressed, without any unusual complications, to a substantial recovery in the time usual in such cases. He was prevented from attending to his ordinary business about six months, and suffered such pain as is ordinarily incident to such fractures. On recovery the ligaments of the knee joint were impaired so that they were more than normally mobile, and troubled him some in moving about. *Held*, that a verdict for more than $5,000 damages was excessive**

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover for personal injuries. The claim of the plaintiff was that on June 24, 1900, while a passenger on defendant's train, through want of ordinary care on the part of its servants, he was severely injured. The only issue tried was as to the proper amount to award plaintiff as compensation. The case was first tried in December, 1901, resulting in a judgment for $12,000. On appeal that was reversed as excessive. 116 Wis. 625, 93 N. W. 843. The court held, that in order to avoid invading defendant's right to an assessment of damages by a jury the error could not be so cured as to avoid a new trial, unless plaintiff would consent to take judgment for $2,500. Plaintiff declined to do that. A new trial was accordingly had resulting in a verdict for $9,500. A motion was made to set that aside as excessive, which was overruled. Judgment was thereupon rendered in plaintiff's favor for $9,500, and costs. Defendant appealed.

Edward M. Hyzer, for the appellant.

John I. Thompson, attorney, and *Charles Barber,* of counsel, for the respondent.

MARSHALL, J. If, as counsel for appellant contends, there is no material difference between the evidence on the last trial and that on the first, as to the loss respondent has suffered, or will suffer, resulting from his injury, it would seem, as a matter of course, that the verdict cannot stand. A decision as to the *quantum* of damages recoverable on a given state of facts, for the case in hand, is *res adjudicata.* It is as absolutely controlling as a decision therein upon any other question. *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241. Hence, so far as the amount recoverable on the facts here was formerly determined, that is the test of the correctness of the present verdict. On such former occasion, with the language "A jury might reasonably assess plaintiff's damages as low as $2,500, and might, of course, assess the same somewhat higher," it was said:

"The range of human judgment in respect to such matters is quite large. It is a very difficult matter to set boundaries beyond which it cannot go. It cannot be done at all with any very great degree of accuracy."

That permitted the jury to go to any limit to which fair-minded men might reasonably place the damages—considering, of course, that a given amount of pain and suffering are not to be measured by the sum of money one would take to be subjected thereto. *Heddles v. C. & N. W. R. Co.* 74 Wis. 239–259, 42 N. W. 237,—but did not fairly suggest that a sum nearly four times the minimum stated might be allowed.

Counsel for respondent strenuously contend that the evidence is far different now than before, and that one material fact, viz.: a simple fracture of the fibula, or small bone of the leg, opposite the compound fracture of the tibia, or large bone thereof, appearing by the evidence on both trials, was not in the mind of the court when rendering the decision. True, the fracture of the fibula was not referred to, but the effect of the injury as a whole was mentioned and that was the ultimate fact for consideration in fixing the compensation. The evidence now, though in much greater volume than before, seems to be substantially to the same effect as formerly. As in *Collins v. Janesville, supra,* there was more evidence, expert and otherwise, on the last occasion than on the first, but the facts it tended to establish were, in the main, the same in one case as in the other.

Except for the omission before to refer to the fracture of the small bone of respondent's leg, no complaint is made but that the nature of his injury and the result as it then appeared are there fairly treated in these words:

"The large bone of the right leg below the knee was broken transversely downward. There was a displacement, giving the injury the character of what is called a compound fracture. It was not specially painful. Plaintiff recovered so far as probably he ever will, in a few months. He was forty-five years of age when injured. His business was

mainly office work. He was sufficiently restored to enable him to attend to such business substantially as formerly. The restored limb is not quite as strong as before. It is not wholly in its normal condition and never will be. The ligaments at the knee joint are so impaired that the joint is more than normally mobile. That permits a slipping outward as the weight of the body is thrown upon the imperfect limb. He is required, in using his limb, to use care and favor the impaired member. He has not full control of the limb, because, as indicated, the ligaments of the knee are to some extent permanently relaxed. He testified that his only difficulty in using his limb was that there was a looseness in the knee joint permitting the leg to bow out about an inch as he threw his weight upon it, and that it troubled him some in moving about."

The evidence now is to the effect that there was a compound fracture of the tibia about two and one half inches below the knee, and opposite thereof a simple fracture of the fibula. While it appeared formerly, as it does now, that respondent suffered considerable pain, it did not and does not appear that the injury, for one of the kind, was specially painful. He testified more at length on the last occasion than on the first in that regard, but did not add materially to what one would naturally infer from the character of the injury, and the length and kind of treatment required therefor. We may well say now, as before, in effect, that the injury, all things considered, was not specially painful. Respondent had prompt and efficient attention from the time of the accident till he recovered. There were no special features in his case. He commenced to mend promptly under treatment and the improvement progressed rapidly to a substantial recovery. It was said before, as indicated, that he recovered so far as he ever will in a few months. It appears the same now. The time occupied in such recovery was about six months. It was said then, as indicated, that he recovered so as to resume his ordinary business and conduct the same as formerly. He so testified most distinctly on the last occa-

sion. Again, it was said that the injured member was not cured so as to be quite as strong as before, and never could be. Now the evidence is to the effect that he customarily walks by the aid of a cane from his home to his place of business, the distance being about half a mile, and returns, several times a day; that by such aid he can walk up and down stairs; that he can go about his office without a cane; that he suffers only a sense of weakness in the limb, except when changes in the weather occur; that in walking the defective limb bows out with a slipping sensation at the knee joint requiring him to use a cane; that aside from relaxation of the ligaments, allowing such abnormal motion, when his weight is thrown upon the injured limb, requiring the use of a cane to enable him to walk conveniently, and the weakness of the limb, rendering him unable to use it as freely as before, it now is and probably will continue to be in its normal condition, as regards the injury. There is no evidence now, nor was there on the former trial, that his earning capacity at his customary labor was permanently impaired by the accident. There is some testimony that the weakness of the limb may increase with age, but on the whole that, at the best, only appears to be a bare possibility.

A more detailed reference to the evidence in the record would only further emphasize what has been said as to the situation presented to the jury to be remedied by a money equivalent, being substantially the same on the last trial as on the first. If there is any difference, it is in respect to the pain suffered by respondent when he was rescued from the wreck, and during the brief period he was at the hospital. We still think the jury might reasonably have assessed his damages as low as $2,500, and might reasonably have named a somewhat larger sum, but not one around four times the minimum stated.

Recapitulating the situation briefly. Respondent was prevented from attending to his ordinary business about six

months. He suffered considerable pain, but only what was ordinarily incident to a compound fracture of the tibia, accompanied by a simple fracture of the fibula. He was treated skilfully from the first and progressed without any unusual complication to a substantial recovery in the usual time in such cases. There was severe pain only at times during a few weeks, which was relieved with reasonable efficiency upon being manifested. After the expiration of six months from the injury he attended to his ordinary business as before, and for aught that appears will always be able to do so, so far as the injury in question is concerned. He will suffer some inconvenience in going about, and the range of his opportunities for employment will be somewhat limited because of the injury. It will probably cause him some pain during changes in the weather, and he will always have a sense of weakness in the imperfect limb, which will to some extent limit his capacity for going about. For that, in the whole, the jury awarded the equivalent, on a six per cent. basis, of an annuity sufficient to support respondent in idleness the balance of his life. Enough to purchase in any of the better class of insurance companies dealing in annuity policies, one yielding $50 per month for the balance of his days. A mere statement of that situation is enough in itself, it seems, to show that the verdict is clearly excessive, is far beyond mere compensation to respondent for his loss. No such amount for a similar loss has been sustained in this or any other court, so far as we can discover. We cannot escape the conclusion that the jurors, without fault of court or counsel, were either influenced by something outside the case, or failed to understand that they were expected to award respondent a mere money equivalent for his loss, so far as the judgment of fair-minded men could arrive at the matter, bearing in mind that the amount to be awarded against a railway company upon a given state of facts is no greater than against the humblest individual. The actual loss to be

paid for cannot be legitimately affected in the slightest degree by the character or capacity to pay of the defendant. A dollar will go just as far, as an equivalent for pain or loss of any kind, coming from one source as from another.

The precedents confirm what has been said. In *Karasich v. Hasbrouck,* 28 Wis. 569, plaintiff, a man of twenty years of age having two ribs broken and one leg so badly bruised and wounded that pieces of the bone worked out through the wound, was confined to his bed for a considerable length of time, suffered much pain and was permanently disabled from following his usual occupation, and rendered reasonably certain to permanently suffer pain to a considerable degree, was awarded $5,000. In *Propsom v. Leatham,* 80 Wis. 608, 50 N. W. 586, a laborer in good health and middle life, who was seriously and permanently injured, one of his legs being broken and partially permanently deformed, was awarded $1,800. In *Rhoades v. Varney,* 91 Me. 222, 39 Atl. 552, a person whose leg was broken in three places and was, after full treatment, permanently shorter than before, was awarded $1,200. In *Meiners v. St. Louis,* 130 Mo. 274, 32 S. W. 637, plaintiff, whose leg was broken and seriously and permanently impaired, was awarded $5,166. In *Beltz v. Yonkers,* 74 Hun, 73, 26 N. Y. Supp. 106, plaintiff, both of whose legs were broken was awarded $5,000. In *Brady v. Manhattan R. Co.* 6 N. Y. Supp. 533, a person whose leg was broken and who also received permanent internal injuries, was allowed $5,000. In *Missouri, K. & T. R. Co. v. Johnson* (Tex. Civ. App.) 37 S. W. 771, $5,000 was allowed. Both bones of plaintiff's leg were fractured between the knee and ankle, and the leg, after treatment, was left shorter than before, and was otherwise considerably deformed and incapacitated for use. In *North Chicago St. R. Co. v. Wiswell,* 168 Ill. 613, 48 N. E. 407, $5,000 awarded for a broken leg was said to be excessive to the amount of $2,500. In *Lombard v. C., R. I. & P. R. Co.* 47 Iowa, 494, a verdict of

$4,000 for a broken leg was reduced to $1,500. In *Black v. C. R. Co.* 10 La. Ann. 33, both of plaintiff's legs were broken and a verdict for $10,000 was reduced to $5,000. In *Slette v. G. N. R. Co.* 53 Minn. 341, 55 N. W. 137, plaintiff, a man of thirty years of age, who sustained a compound fracture of the thigh bone and was left, after treatment, with his leg permanently defective, but not so as to materially interfere with his earning capacity, received a verdict of $4,100, which included $100, paid out for treatment, and it was reversed as being far beyond the proper limits of mere compensation.

We regret the necessity to reverse the judgment in this case a second time for excessiveness of the verdict. We acquit counsel on both sides of any responsibility therefor. Moreover, the error of the court in not dealing with the excessive verdict, as it seems should have been done, especially in the light of the former decision, is one such as often occurs in this class of cases without suggesting any serious want of judicial attention. The burden of duty in such situations is not easy to bear. A high order of judicial courage is required to fully discharge it. That there are sometimes failures in that regard is by no means surprising. Such failures are generally quite excusable, notwithstanding the necessity to atone therefor here. But the more fully duty is discharged at the circuit in such matters, the more certainly justice in the ultimate will be measured out between parties, since a failure in that regard must be very clear to warrant rectification thereof here.

It is considered, as before indicated, that judgment should not go against appellant without his consent so as to avoid a third trial, unless plaintiff will consent to take $2,500, and costs. On the other hand, it is considered that the maximum amount that can reasonably be awarded to plaintiff by reason of his injury is $5,000. So far as proper practice will permit, we will respond to the request made by counsel upon both sides to terminate this litigation without further delay.

The disposition we have concluded to make of the matter, without invading the rights of the parties to a jury trial, will enable either to close the controversy speedily without the consent of the other.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial, unless defendant, within twenty days after receiving written notice of the filing of the remittitur in the court below, serves upon plaintiff's counsel consent in writing to judgment in his favor for $5,000, and costs, as heretofore taxed, or unless in case of failure to serve such notice plaintiff, within thirty days after such filing of the remittitur, serves upon defendant's counsel consent in writing to take judgment for $2,500, and costs, as heretofore taxed. In case of consent by either side, as indicated, judgment may be rendered upon application of plaintiff to the court having jurisdiction in the matter, without notice.

KNICKEL and another, Respondents, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

November 18—December 13, 1904.

Railroads: Negligence: Fires: Dilapidated buildings: Carelessness: Court and jury: Instructions to jury: Special verdict.

1. Defendant railway company maintained upon its right of way a very old and dilapidated warehouse, the roof never having been repaired or reshingled in about thirty years. The shingles and roof boards were rotted, the former being loose and curled up and in many places missing entirely, so as to expose the roof boards. There was no charge of defective apparatus or of negligent operation thereof. Defendant's locomotive communicated fire, by sparks, to such warehouse, which fire, aided by a high wind, was communicated to plaintiff's premises. *Held*, that the jury were warranted in finding defendant's conduct negligent, if the other element of reasonable anticipation of injury were also found.

2. One may be as careless as he pleases with reference to his own property and not be charged with negligence in law, unless an ordinarily prudent person might reasonably anticipate that such carelessness might probably result in injury to others.
3. In an action for negligently permitting fire to escape from defendant's premises and communicate to plaintiff's building whereby it was destroyed, in connection with a question of the special verdict as to whether defendant's acts were the proximate cause of plaintiff's loss, the court instructed the jury, that it might be such proximate cause when such injury was the natural and probable consequence of the negligence, and "when in the light of all the attending circumstances, the party chargeable with such negligence should reasonably have foreseen that it might cause some similar injury." The court also charged that they might answer the question in the affirmative if they found "that the defendant company, acting through its proper representatives and servants, should reasonably have foreseen, before the fire occurred, that such negligence might result in communicating fire to other property." *Held*, that such instruction was erroneous in that it permitted the jury to use as a standard their ideal of what the defendant ought to have anticipated, instead of that which an ordinarily prudent person, under like circumstances, would have anticipated.
4. Such error is, however, cured by the submission of another question of the special verdict, in which the jury were given the correct standard and under which they found the element of anticipation.
5. In framing a special verdict, it is not to be expected that the court will attempt to embody all the facts and circumstances as in a hypothetical question to an expert; hence, where fire had originated by sparks from defendant's locomotive, in submitting to a jury a question of a special verdict, it is not error to refuse to incorporate in such question after the word "locomotive," the words "properly equipped with proper spark-arresting machinery in good condition."

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On October 30, 1901, the defendant, without negligence in the construction, repair, or operation of its locomotive, communicated fire, by sparks, to a warehouse permitted to remain upon its right of way some forty-two feet from its main track, which fire, by reason of a very high wind, and

aided by the dilapidated condition of the warehouse, to be hereinafter mentioned, was communicated to plaintiff's premises about forty rods away, whereby his barn and considerable personal property was destroyed. The warehouse in question was very old and dilapidated, roof never having been repaired or reshingled in about thirty years of the life of the building, the shingles and roof boards being rotted, and the former loose and curled up, and in many places missing entirely, so as to expose the roof boards. The jury, by special verdict, found the defendant guilty of negligence in permitting the warehouse to remain where it was, which was the proximate cause of the burning of plaintiff's property; which result ought, by a man of reasonable care and prudence, under the circumstances, to have been reasonably anticipated. After motion to reverse the answers to such questions and to set aside the verdict and grant a new trial, judgment was entered in favor of the plaintiff, from which the defendant appeals.

Edward M. Hyzer, for the appellant.

For the respondents there were separate briefs by *T. L. Doyle,* for respondent *Knickel,* and by *M. L. Lueck,* for respondent *Herman Farmers' Mutual Fire Insurance Company,* and oral argument by *Mr. Doyle.*

DODGE, J. 1. The jury having negatived all charges of defective apparatus or of negligence in operation of the same, this case presents nothing of the peculiar liability of railroad companies in the conduct of their inherently dangerous business. It presents a question equally applicable to every property owner who maintains an inflammable building in close proximity to railroad tracks over which engines must pass, emitting, as they always do, some measure of sparks. It may be conceded, for the purpose of discussion, that maintenance of frame buildings with shingle roofs within forty feet of a main railroad track is so common that such act alone is, as

matter of law, not negligence; it being so in accord with the known custom of the great mass of mankind. That, however, is not the question upon which this case turns. Though it be conceded that the maintenance of a sound, solid building near a railroad track is not negligence, must it not be held that some degree of variance from such a condition, whereby ignition from the ordinary perils of the railroad becomes more probable, may be so variant from the ordinary conduct of mankind as to open the door for the jury to characterize it as negligence? It seems this must be so. Indeed, counsel for the appellant does not controvert this view. He seems to concede that, if inflammability was increased by the age and dilapidation characterizing this building, that the door was open to the jury to consider whether it exceeded in that respect buildings maintained by the great mass of mankind, and, if so, to find the conduct negligent in the legal sense, if the other element of reasonable anticipation of injury might also be found.

The principal argument, however, is that there is no evidence that old and decayed wood, when dry, is more inflammable than sound wood, equally dry. Counsel insists that, if such be the fact, it is capable of proof by experts, or those having special experience on the subject. But this discussion ignores other elements in the evidence to the effect that not only were the roof boards and shingles upon the top of this building decayed and old, but that they were loose, curled up, and that in many places the shingles were entirely lacking. These facts seem clearly to present a situation more likely, in common knowledge, to furnish a lodgment for flying cinders than if the roof were sound, and covered with smooth, flat shingles; and that such enhanced peril of ignition presents properly a jury question whether it extended to the degree of negligence, namely, the absence of that care and caution which ordinarily prudent persons do exercise under like circumstances, and so that the ordinarily prudent

person would anticipate that sparks such as fly from the usual locomotive engine might probably lodge and ignite the roof in times of drouth and high wind.

Still another element of possible negligence in the maintenance of such a building is the increased peril that after ignition it may, by reason of its dilapidation, looseness of shingles, and the like, more readily communicate the fire to other buildings. In connection with this idea it is shown that the warehouse was set upon posts three or four feet from the ground, with no inclosure under it, so as to furnish an underdraft of air, giving it almost the effect of a funnel, thus rendering probable, if not certain, the more easy and rapid carrying away of the burning brands, attached so loosely as they were to the roof. This was, of course, an element of the negligence ascribed to the defendant if it increased the probability of communicating fire to other buildings. One may be as careless as he pleases with reference to his own property, and not be chargeable with negligence in law, unless an ordinarily prudent person might reasonably anticipate that such carelessness might probably result in injury to others. We are not prepared to say that the extreme dilapidation of this building in the respects above suggested did not present a case from which a reasonable mind might conclude that there was negligence.

2. By the sixth question of the special verdict the court inquired of the jury whether the negligence of the defendant in maintaining the building in question was the proximate cause of the plaintiff's loss, and, in connection with that question, instructed the jury that it might be such proximate cause when such injury is the natural and probable consequence of the negligence, and "when, in the light of all the attending circumstances, the party chargeable with such negligence should reasonably have foreseen that it might cause some similar injury." Also that they might answer the question in the affirmative if they found "that the defendant company,

acting through its proper representatives and servants, should reasonably have foreseen, before the fire occurred, that such negligence might result in communicating fire to other property." It is urged by appellant that these instructions are erroneous, in that they set up as a test merely what the jury think the defendant ought to have anticipated, instead of that which an ordinarily prudent person, under like circumstances, would have anticipated. This subject was quite fully discussed in *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764, and in *Dehsoy v. Milwaukee E. R. & L. Co.* 110 Wis. 412, 416, 85 N. W. 973. In the latter case, in speaking of a charge which allowed the jury to consider the care and foresight which might reasonably have been anticipated of the conductor of a street car, we said:

"It permits the jury to use as a standard their ideal of what a conductor ought to be, instead of that which he customarily is, as ascertained by actual human experience and common knowledge. In this, error was committed."

The instruction complained of was erroneous in this respect, and necessitates the conclusion that in the sixth question and answer, standing alone, are not found all the elements of proximate cause. That question and answer probably did find, under instructions which are not assailed, actual or natural causation, but did not find that element of anticipation by a reasonably prudent man, which in so many cases has been said to be essential. We are convinced, however, that this failure of the jury to find this issue in answer to the sixth question is cured by question 9½, which inquired directly:

"Ought a man of reasonable care and prudence, engaged in the same business that the defendant was in at the time in question, and under similar conditions and circumstances, to have reasonably anticipated that, because of the condition that the Degenhart warehouse was in, it would be likely to take fire from sparks emitted from the stack of a locomotive, and that the burning brands or shingles would be carried

from the fire so started, under similar conditions, to the property of the plaintiff, forty rods away, or to other property as far away in that vicinity, and set fire to the same?"

In this question the jury were given the correct standard, and have found the element of anticipation which, by reason of the erroneous charge above mentioned, escaped them in the sixth.

The appellant further complains that the court refused to embody in this question 9½, after the word "locomotive," the words "properly equipped with proper spark-arresting machinery in good condition." There was no error in refusing this request. There had been considerable evidence of cinders and sparks of a size inconsistent with such equipment and condition; and while, by the verdict, it is now recognized as a fact that there was no defect, it was one of the controverted issues when the verdict was submitted. The court embodied in the question the duty to consider all the conditions and circumstances, which, of course, included the condition of the engine, as they might find it. Further, however, it is not to be expected that the court shall attempt, in framing a special verdict, to embody all the facts and circumstances as in a hypothetical question to an expert. An attempt to do so would involve much of danger, for any omission might be very misleading.

We find no error well assigned.

By the Court.—Judgment affirmed.

McCULLOUGH, Respondent, vs. VILLAGE OF CAMPBELLSPORT, Appellant.

November 18—December 13, 1904.

Municipal corporations: Villages: Street improvement: Authority: Statutes: Abutting owners: Damage from change of grade: Injunction: Constitutional law.

1. Under subd. 11, sec. 893, Stats. 1898, village boards have power to lay out, open and widen streets; grade, improve and repair or discontinue the same or any part thereof; make, or otherwise improve, keep in repair, or discontinue sidewalks, and the requisite authority to defray the expenses incident to the exercise of these municipal functions is granted such boards by secs. 911, 912, and 914*a*, which empower them to raise the necessary means by taxation. Under sec. 905, Stats. 1898, the cost of improvements by paving, macadamizing, or otherwise of a particular street or part of a street, and building gutters and sidewalks in connection therewith, is chargeable upon the abutting property by special assessment. Plaintiff sought to enjoin the defendant village from excavating and grading the street adjacent to his property to a grade line adopted by the defendant, which would lower the surface in front of plaintiff's premises about eleven inches, and from building a sidewalk thereon. *Held*, upon the ground that the village board had not taken the requisite steps under the statute to give its proceeding validity under said sec. 905, that the village could not be enjoined, since the steps taken by the board clearly indicated action under the authority granted for making general street improvements, by subd. 11, sec. 893, to be paid for out of the general street improvement fund, in respect to which no irregularity was suggested or found.
2. In the absence of any law giving owners of real estate adjoining a public street or highway a right to recover damages from the municipality on account of a change of grade, no damages are recoverable, unless the premises of the adjoining owner have been injured by the negligence of the municipality.
3. In the absence of any law giving owners of real estate adjoining a public street or highway a right to damages against a municipality on account of a change of grade, such change of grade is not the taking of private property for public use.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

An action to restrain the defendant, its officers, agents, and servants, from excavating and grading the street adjacent to plaintiff's property to the grade line adopted by defendant, and from building a sidewalk thereon, under the direction of the village board. The court found as facts that defendant is a duly incorporated village; that plaintiff is one of the owners in fee of the lots described in the complaint and abutting on Main street of the village; that the village board, on October 6, 1902, by resolution, adopted a grade line for laying and constructing sidewalks on Main street, fronting plaintiff's property and that of other abutting owners; that the village officers were instructed to grade Main street to this established grade line, and lay a sidewalk thereon, passing in front of plaintiff's property; and that the grading and the sidewalk so to be built by the village officers and servants was within the limits of Main street. It was also found that, if the grading and excavating were done to the established grade line, it would lower the natural surface of Main street in front of plaintiff's premises to a point about eleven inches lower than the present grade of Main street, making access to plaintiff's store inconvenient and difficult, and impairing the use of it for the usual purposes of a store. Plaintiff alleges that the proceedings of the village board authorizing the improvement were irregular and void, and that the improvement would cause him irreparable damage and loss, and he therefore prayed that the village and its representatives be restrained from carrying out the improvement. Many other facts were found, which are not material to a decision of the case, and need not be adverted to upon this appeal. The court granted the relief prayed for, and awarded damages in a nominal sum. This is an appeal from the judgment in plaintiff's favor perpetually restraining the village authorities from carrying out the contemplated improvements, and awarding him nominal damages, with costs of the action.

T. L. Doyle, for the appellant.

For the respondent there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*.

SIEBECKER, J. The village board was enjoined from prosecuting to completion the contemplated improvement by grading Main street to the established grade and building a sidewalk in front of plaintiff's premises. It is found that the village board, on October 6, 1902, at a stated meeting, by resolution adopted a street and sidewalk grade for Main street, and directed its street superintendent to build a sidewalk on the established grade. This sidewalk would pass in front of plaintiff's store building, and necessitate a lowering of the street surface to the depth of nearly eleven inches below the surface of the present walk. The village was enjoined from making this improvement upon the ground that the village board did not take the requisite steps under the statute to give its proceedings validity under the powers granted to village boards by sec. 905, ch. 40, Stats. 1898. It appears that the board undertook to establish a street and sidewalk grade on some of its streets, including Main street bordering on plaintiff's premises, and to build a sidewalk on the established grade in front of his property. In ordering the improvement no attempt was made to charge the cost to the owners of the abutting property, as prescribed by sec. 905. We must therefore look elsewhere in the statutes for power authorizing the action taken by them. Subd. 11, sec. 893, grants village boards power "to lay out, open, . . . and widen . . . streets . . . (and) . . . alleys . . . to grade, improve and repair or discontinue the same or any part thereof; to make . . . or otherwise improve, keep in repair, . . . or discontinue sidewalks and crosswalks." The performance of these duties clearly requires expenditures to defray the expense incident to the exercise of these municipal functions. The requisite authority for this purpose is granted them by secs. 911, 912, and 914*a*, which empowers them to

raise the necessary means for the improvement of the streets and sidewalks by taxation. A comparison of these sections with sec. 905 clearly shows that the expenses incident to improving the village streets generally for public use and travel are to be defrayed by the inhabitants by general taxation, while the cost of the improvement by paving, macadamizing, or otherwise of a particular street or part of a street, and building gutters and sidewalks in connection therewith, as contemplated by sec. 905, is chargeable upon the abutting property by special assessments in the manner and upon the conditions prescribed by this section. The steps taken by the village board clearly indicate they were acting under the authority granted them for making general street improvements, under which the village board may establish street and sidewalk grades and build sidewalks, to be paid for out of the general street improvement fund. It is not suggested that the proceeding of the board was irregular or void under this authority, and we find nothing in the record which impeaches the validity of their action.

It was considered by the court that, if the village made the improvement as directed, plaintiff's premises would thereby be materially damaged in value, access thereto from the street made difficult and inconvenient, and its use materially impaired, causing him irreparable injury. The court found all that had been done and what would be required to complete the improvement was confined within the limits of the street. Under these circumstances plaintiff has no cause of action for the impairment of and interference with his facilities for ingress and egress. It has been repeatedly asserted in the decisions of this court that, in the absence of any law giving the owners of real estate adjoining a public street or highway a right to recover damages from the municipality on account of the change of grade, no damages can be recovered on account of such change of grade unless the premises of the adjoining or abutting owner have been injured through the negligence

of the municipality or its agents in making such a change, and that such a change of grade is not the taking of private property for public use. *Wallich v. Manitowoc,* 57 Wis. 9, 14 N. W. 812; *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039. If, however, the municipality or its agents, in making such improvements, are guilty of an actual physical invasion of the adjoining premises, either by occupying a part of them in making an embankment to raise the street, or by taking a part in grading, or by causing it to subside and fall by excavations, then they are not within the protection of the principle of the foregoing cases, and liability attaches. *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448; *Damkoehler v. Milwaukee,* 124 Wis. —, 101 N. W. 706. Under the facts of this case the village board acted regularly within their authority, and plaintiff's rights were not violated, and no cause for restraining the village and its agents from completing the improvement as contemplated by the resolution of the board is shown.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment dismissing the complaint.

GARDNER, Respondent, vs. PAINE LUMBER COMPANY, Appellant.

November 19—December 13, 1904.

Master and servant: Personal injuries: Contributory negligence: Evidence.

In an action for personal injuries received by a servant in a planing mill, under the evidence, stated in the opinion, plaintiff is *held* to be guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge *Reversed*

This is an action to recover for personal injuries received by the plaintiff, November 23, 1901, while operating a machine called a "sticker," in the planing mill of the defendant at Oshkosh, resulting in the amputation of his right hand. The plaintiff claimed negligence on the part of the defendant (1) in failure to instruct, (2) in furnishing insufficient light, (3) in defective adjustment of the machine, and (4) in absence of spouts to carry the shavings from the knives. It appeared by the evidence that the plaintiff was twenty-six years of age at the time of the accident; that his home as a boy was at Winneconne, in this state; that he went to school from the time he was seven until he was fourteen years of age, when he began to work at the barber's trade with his father, and continued at that occupation in various cities of the state, including Marshfield and Marinette, until the fall of 1899, when he cut wood all winter; that he continued at the barbering trade during the following summer, cut wood again during the winter of 1900–01, went to Milwaukee and resumed the barbering trade during the following summer, and in November, 1901, went to Oshkosh, and obtained employment as a common laborer at the defendant's planing mill on the 8th of November; that he at first piled lumber, tied pickets, and did other miscellaneous labor of this kind about the mill, and that about a week before the accident he operated a molding sticker like the one in question, except that it was furnished with shaving spouts, during one afternoon, turning out what is called "electric light molding;" that he had no other experience operating such machines; that on the day in question he was set at work putting strips, one inch square, through the molding sticker in question, and turning out moldings called "quarter round;" that after he had been at work about twenty minutes one of the strips stopped in its progress through the machine, and that he pushed or pulled a lever which he testified that he supposed stopped the machinery, and went around on the side of the

machine and attempted to push the strip away from the guide by which he supposed it had been stopped, and his hand was caught and mutilated by knives revolving on what is called the "under head" of the machine.

The jury returned the following special verdict:

"(1) Excepting that plaintiff had operated a molding machine during half a day in the previous week, was he without any experience in doing that work up to the day of his injury? A. Yes. (2) Before the injury occurred, did defendant receive information from plaintiff to the effect that he did not know how to operate the machine? A. Yes, through Rathbun. (3) Did defendant fail to properly instruct plaintiff how to stop the motion of the heads which contained the knives in the machine? A. Yes. (4) Was the stopping of the quarter-round in the machine caused by defective adjustment of its parts? A. Yes. (5) Were all the incandescent lights extinguished in the mill when plaintiff was injured? A. No. (6) Was the light which was supplied for operating the machine at the time of plaintiff's injury insufficient to have enabled him to discover, by the exercise of ordinary care on his part, that there was in the machine an underhead which contained knives? A. Yes. (7) At the time of the injury, was the machine without any shaving spouts? A. By the court, by consent of counsel: Yes. (8) (Withdrawn by the court, and not submitted). (9) If the third, fourth, sixth, and seventh questions, or any one or more of them, be answered 'yes,' then, did the defendant fail to exercise ordinary care in relation to any one or more of the matters specified in those four questions and the answers thereto? A. Yes, 3, 4, 6, 7. (10) If your answer to the ninth question be 'yes,' then, in what matters referred to in the ninth question did defendant fail to exercise ordinary care? (See 3d, 4th, 6th, and 7th questions, and answers thereto.) A. In those matters or particulars which are specified in the third, did fail to properly instruct; fourth, by defective adjustment; sixth, light was insufficient; seventh, machine was without shaving spouts; questions and answers thereto. (11) If your answer to the tenth question finds that defendant did fail to exercise ordinary care in relation to any of the matters specified in that question, then, was such failure the proximate cause of

plaintiff's injury? A. Yes. (12) Before plaintiff was injured, did he know how to stop the motion of the knives in the machine? A. No. (12½) Did the plaintiff know, or would the exercise of ordinary care on his part, with such experience as he possessed, have enabled him to know, that the so-called underhead with its knives was a part of the machine? Answer. (a) Plaintiff did not know. (b) The exercise of ordinary care would not have enabled him to know. (13) Was plaintiff guilty of any want of ordinary care which contributed to produce his injury? A. No. (14) If the court shall be of the opinion that plaintiff is entitled to judgment in his favor, at what sum do you assess his damages? A. 7,000.00 dollars."

Judgment was entered on this verdict for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Thompsons, Pinkerton & Reed,* attorneys, and *Charles Barber,* of counsel, and oral argument by *Mr. Barber* and *Mr. A. E. Thompson.*

For the respondent there was a brief by *Eaton & Eaton,* attorneys, and *Maurice McKenna,* of counsel, and oral argument by *M. H. Eaton* and *L. K. Eaton.*

WINSLOW, J. The chief contention made by the appellant is that the undisputed testimony shows that the plaintiff was guilty of contributory negligence as a matter of law, and this is the only contention which we find it necessary to discuss. The discussion of this question necessarily involves a review of the facts upon the most favorable theory to the plaintiff which they will reasonably sustain.

The plaintiff was not a boy. He was a man who had reached the age of twenty-six years. He had attended school from his seventh to his fourteenth year, and then gone to work as a barber; he had pursued this trade in various cities in this state, a number of which were lumbering places, most of the time till the winter of 1899 and 1900, when he cut cord wood all winter, engaged in barbering again during the following summer, and in the following winter again worked

at cutting cord wood. He was ordinarily intelligent and bright for a man in his walk of life; no claim is made that either his reasoning or perceptive faculties were in any respect impaired or dull. He went to work as a laborer in and about the planing mill of the defendant on the morning of the 9th of November. This mill was a large mill containing many planers, slashers, stickers, and other machines of like nature, operated by steam power communicated to the machines by line shafting and belts. The particular department in and about which the plaintiff worked was a long room, its length from east to west being three or four times its width from north to south. The shafting ran from north to south, and the machines in this room, which included six or more slashers, as many ripsaws, nine stickers, a planer, a matcher, and a picket machine, all fronted to the north, the rough lumber coming in at the south side of the room, passing through the machines, the finished product being taken out on the north side of the room. The machines generally were about four feet apart. The room was lighted, when necessary, by three electric arc lights, and by a large number of incandescent bulb lamps suspended by cords, so that there were two or three of such lights within a few feet of each machine. There was no electric bulb immediately over the machine in question, but there was one five feet from the north end thereof, and another four feet or so from the west side. The electric cords were long enough so that the lamps could be let down and moved about through a considerable space for the purpose of inspecting the machine. It is undisputed that these two lights, at least, were lighted at the time of the accident. The sticker machines were all of substantially the same general construction and principle. They are designed for the purpose of receiving strips of rough lumber at one end and turning it out at the other as a complete molding finished on all sides by a single operation. The one in question consists of an iron table or platform (over which the material

passes) about eight feet in length, three and one half feet in height, and the same in width, open on the sides. At the south end is the countershaft, power pulley, and pulleys to operate the feed and knives. The operator stands at the south end, and feeds the unfinished strips into the machine through guides. It passes first through the feed rolls, immediately after which it is operated on by the first set of knives, fastened to what is called the "top head." There are four of these "heads," called, respectively, the "top head," the two "side heads," and the "lower head." These heads are blocks of iron or steel, about eight inches long and four inches square, on two corners of which are set knives. They are attached to a short shaft, on the other end of which is a pulley, on which is the belt running to the power pulley. The knives and heads revolve at the rate of 2,000 revolutions per minute. The top head is necessarily above the table with its shaft and pulley. After passing the top head the material passes along the guide, and is operated upon first by one side head and then by the other. These side heads are of the same construction as the top head, but they necessarily are in a vertical position, projecting above the table, the pulley being beneath. The material then passes to the under head, which with its pulley is under the table, the knives being allowed to project slightly above the table through an aperture therein, which may be made to vary in width from two and one half to six inches. The finished material then passes out at the rear of the machine. The power is applied to and removed from the feed rolls and heads by means of levers at the right of the operator at the south end of the machine, one lever operating the feed rolls and another the heads. All of the sticker machines except the one in question had shaving spouts and tubes in connection with each head, whose function is to carry away the shavings made by the head. The machine in question, being new, had no such spouts, but the lack of such spouts is immaterial, because it did not contribute in any way to the acci-

dent. About a week before the accident the plaintiff was set at work at one of the other stickers, putting through long slats which came out as moldings, with two deep grooves on the bottom, for use in electric light work. He operated this machine successfully nearly or quite a half day, but testifies that he did not set it in motion or stop it. On the day of the accident he was set at work at the machine in question to make a small molding called "quarter round," in the making of which but three heads are used, one of which is the lower head. He testifies that he was given no instructions, but simply told to go ahead. He first oiled the machine wherever he saw oil holes, but was of opinion that he did not oil about the lower head. A man running a neighboring machine started it for him by pulling or pushing the levers, and he began to put the rough material, about an inch square, through the machine in the place indicated by the guides. After working about twenty minutes a strip stopped, and he threw the lever, which operated the feed rolls only, supposing, as he says, that he had stopped the machine entirely. He then went around to the left side of the machine to see what was the matter, and saw that the strip had stopped, apparently against one of the guides. He testifies that it was dark; that he saw no aperture in the table, nor did he see any revolving knives; that he put down his gloved hand to push the strip away from the guide, and his fingers were caught by the revolving knives on the under head and mangled.

The claim is that on this evidence the question whether he was guilty of contributory negligence was properly one for the jury. We cannot think so. As before stated, he was a man of experience in the world, and in possession of all his faculties. He must have known that a machine doing the work which he saw these machines do before his very eyes was and must be a complicated machine, fitted with numerous powerful cutting instruments, which necessarily were moving with great velocity and power. The danger signal was before

him, and could not be mistaken except through the most heedless inattention. He himself says:

"I knew there were some kind of knives in the machine. . . . I knew they couldn't make shavings and quarter rounds unless they had some kind of knives."

But he says he did not know where they were located, and he could see nothing but a black surface where he placed his hand, and that he thought he had stopped the machine. But here again it becomes apparent that these are mere excuses for unpardonable inattention or reckless disregard of consequences. He could not fail to know, if he bestowed the least thought on the question at all, that the machine was still in operation; the belts were necessarily in rapid movement—he admits the large belt of the machine was still moving; the heads, weighing sixty pounds each, were revolving with great velocity, necessarily imparting a constant whir and vibration to the machine; they were all right before him, except that the small belts were underneath the table. If he was so ignorant as he testifies as to the location of the knives, and if the light was so dim that he could not see, ordinary prudence only called the more loudly for careful examination before placing his hand in the very midst of so powerful a machine.

We have been unable to see any escape from the conclusion that the plaintiff must he held guilty of contributory negligence. Such accidents are always very distressing, and the appeal to the sympathies is strong, but legal rules cannot be varied for such reasons. Adjudicated cases are of little substantial help, because there are never two accidents under exactly the same circumstances. Among the cases in this court having some analogy to the present case may be named *Dougherty v. West Superior I. & S. Co.* 88 Wis. 343, 60 N. W. 274; *Schiefelbein v. Badger Paper Co.* 101 Wis. 402, 77 N. W. 742; *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Koepcke v. Wisconsin B. & I. Co.* 116 Wis. 92, 92 N. W. 558. A verdict for the defendant should have been di-

rected, in default of which the motion of defendant for judgment *non obstante* should have been granted. Not having been granted, this court will direct the proper judgment, instead of ordering a new trial. *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800.

By the Court.—Judgment reversed, and action remanded with directions to render judgment in favor of defendant.

WALLS, Respondent, vs. CUNNINGHAM, Appellant.

November 19—December 13, 1904.

Waters: Ownership of bed of stream: Presumptions: Evidence: Boundaries: Fences: Trespass: Statutes: Conditions precedent.

1. The owner of the bank of a stream presumably owns the bed thereof to the thread of such stream subject to public rights.
2. In such case, some clear evidence to the contrary is necessary to rebut that presumption, and mere evidence of the conveyance of all of a certain tract of land on a specified side or bank of such stream, or of land giving the meander line of such stream as a boundary, is not sufficient.
3. Plaintiff and defendant owned, occupied and used lands separated by a stream. The holding of each was enclosed on all sides except along that stream, and no proceedings were ever taken by either for the establishment and partition of the line for a division fence between their holdings. Plaintiff's cattle escaped from his pasture to that of defendant's on the opposite side of the stream, where they were distrained, and plaintiff thereupon brought action to recover possession of the cattle. *Held,* under sec. 1391, Stats. 1898 (making the maintenance of division fence between owners of adjoining land obligatory, and providing that a land owner who does not comply therewith shall not be entitled to damages for any trespass), and sec. 1395 (applying to cases where the division line is the thread of a river and it is impracticable to maintain a fence thereon), that compliance with such statutes was a condition precedent to damages for a trespass, such as the defendant sought to redress by distraining the cattle.

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Action by one of two adjoining landowners to recover of the other some cattle belonging to the former, which the latter had distrained while trespassing on his land, they having escaped from the land of such other to that of his at a point where there was no division fence.

Plaintiff's right to recover turned on whether the statutes on the subject of division fences applied to such a situation as the division line in question.

The case was tried by the court. It was admitted, or the evidence established these facts: Plaintiff's land is described as "all the south half of the southwest quarter of section three lying on the west bank of Pine river, and all of the southwest quarter of the southeast quarter of section three which lies west of Pine river. Also commencing at the northwest corner of section ten, thence east to Pine river, thence down the west bank of said river to the south line of the north half of the northwest quarter of said section, township eleven, range one, east, in Richland county." Defendant's land is situated opposite plaintiff's and is described thus: "Commencing on the southwest corner of lot one in fractional block three in the village of Rockbridge, thence running west to the channel of Pine river, thence up said channel north to the Austin branch; thence up said branch to the centre of Pine river road; thence southeast in the center of said road, etc., subject to flowage of said lands by reason of the milldam at such height as was established when the mill at Rockbridge was running at full head, not exceeding eight feet at the dam at an ordinary stage of water." The mill was practically in ruins and the dam ceased to exist some years before the date of the alleged trespass. The lands were used by the respective parties for farming purposes. No proceedings were ever taken by either for the establishment of the line for a division fence between their holdings, and a partition of such line.

Each holding was inclosed on all sides, except along the river. The owners had used their lands in that condition for some years. The plaintiff's cattle escaped from his pasture to that of the defendant on the opposite side of the river, where they were taken up by the latter. Cattle had been accustomed to pass back and forth from one pasture to the other in the same manner. In case of a restoration of the dam the back water therefrom would cover a considerable part of defendant's land. The maintenance of the fence along the bank of the river would be a matter of considerable difficulty because of the banks being so low that the fence would be at times submerged and destroyed.

The decision was to this effect: The lands of the parties are adjoining lands within the meaning of sec. 1393, Stats. 1898. The word "river" in sec. 1395 of such statutes includes Pine river. No proceedings were taken under such statutes and no decision of fence viewers obtained as to where the partition fence should be built between the holdings of the parties, or that such a fence was impracticable, therefore the escape of cattle belonging to one owner across the division line between his land and his neighbor's to the land of the latter, gave to such neighbor no right of action for trespass. Pursuant thereto judgment was rendered for the plaintiff and defendant appealed.

The cause was submitted for the appellant on the brief of *F. W. Burnham,* and for the respondent on that of *Richmond & Lincoln.*

MARSHALL, J. The first proposition presented, though it is not distinctly stated, is that the finding that the lands of the parties were adjoining lands within the statutes on the subject of division fences, is wrong. Authority is cited to show that one deemed to be the owner of the bed of a navigable stream to the center line thereof on one side as incident to ownership of the shore on that side, may convey the bank

so as to sever title thereto from the bed, putting the ownership of the latter in one and of the former in another. *Norcross v. Griffiths,* 65 Wis. 599, 27 N. W. 606. The principle contended for is sound, but the evidence here supports the trial court's view that no such severance was accomplished. The owner of the bank of a stream presumably owns the bed thereof to the thread of such stream subject to public rights. Some clear evidence to the contrary in any case is necessary to rebut that presumption. Mere evidence of the conveyance of all of a certain tract of land on the specified side or bank of a stream, or of land giving the meander line of a stream as a boundary, is not sufficient, as is clearly indicated in *Norcross v. Griffiths, supra.* There the evidence was much stronger in favor of the claim that the water's edge, and not the center of the stream, was the boundary line than in this case, and yet the latter was held to be the true boundary. The land was described by metes and bounds. The river was not mentioned. The proof showed that the boundary on the side towards the river included the whole of the bank. The claim was made that, since it was competent to convey the bank separate from the bed of the stream, the stream was not mentioned and no specific boundary was given other than one coinciding with the ordinary water's edge, it should be held that the parties did not intend the description to include land reaching further than such line. The court decided that the circumstances were not sufficient to rebut the presumption heretofore mentioned.

It being conceded, or established by evidence, that the lands in question were occupied and used by the respective owners and were adjoining lands within the meaning of the statutes as to division fences there was no escape from the conclusion arrived at, that compliance with such statutes was a condition precedent to damages for a trespass, such as the defendant sought to redress by distraining the cattle. Such is the obvious effect of the statutes as ruled in *Roach v. Law-*

rence, 56 Wis. 478, 14 N. W. 595. Sec. 1391 makes the maintenance of division fences in such a case obligatory and provides that a landowner who does not comply therewith shall not be entitled to damages for any trespass, which such maintenance is designed to prevent. Sec. 1395 applies to a case where the division line is the thread of a river and it is impracticable to maintain a fence thereon. It provides that when the boundary line is a river, which of itself is not a sufficient fence, and it is impracticable, without unreasonable expense, for a fence to be built on the division line, and either owner or occupant shall refuse to join in making a partition fence on either side thereof, or they disagree respecting the same, either "may apply to two or more fence viewers of the town, who, after giving notice as provided in sec. 1393, shall proceed to view such river; . . . and if they shall determine that the same is not a sufficient fence and that it is impracticable, without unreasonable expense, to build a fence on the true boundary line they shall, in writing under their hands, determine how or on which side thereof the fence shall be built or whether partly on one side and partly on the other, and assign to each owner or occupant his share thereof and the time within which the respective parties shall build the same, and file such determination in the office of the town clerk, who shall record the same. . . . If said fence viewers shall determine that it is impracticable, either from the formation of the banks of such river, . . . or from any other cause, to maintain any fence along or near said boundary line they shall give written notice to the parties of such determination."

By the Court.—The judgment is affirmed.

LYNCH, Respondent, vs. TOWN OF WALDWICK, Appellant.

November 19—December 13, 1904.

Highways: Injuries from defects: Contributory negligence: Evidence: Instructions to jury: Carelessness.

1. In an action for injuries from a defect in a highway, under the evidence, stated in the opinion, it is *held* that a situation was presented which warranted the jury in acquitting plaintiff of contributory negligence.
2. In an action for personal injuries caused by the negligence of defendant town in failing to keep its highways in repair, no error can be predicated upon refusing a requested instruction: "If the plaintiff placed himself in a position of known danger, when he might have avoided it, and while there received the injury of which he complains, he was guilty of negligence, although the danger may have been caused by the negligence of the town authorities," the court having instructed the jury that if plaintiff failed to exercise such care as the great mass of mankind ordinarily exercise under the same or similar circumstances, he could not recover.
3. Such requested instruction is incomplete and inaccurate in that it lacks two important qualifications essential to its accuracy: First, that the injury did actually result from the conduct of plaintiff, and, secondly, that an ordinarily prudent man should, under all the circumstances, have reasonably anticipated some injury as the result of such conduct.
4. Mere carelessness does not prevent recovery for the negligent acts of another, unless an ordinarily prudent man would have anticipated probability of some injury, nor can it defeat the action unless it did in fact contribute to the injury.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Action for personal injuries due to defect in highway. Evidence tended to prove that plaintiff and his father-in-law, with the latter's team and sleigh, were hauling to plaintiff's farm a gasoline engine weighing about 1,500 pounds, inclosed in a crate of which the base was approximately two feet by four, and which was about four feet high, the principal weight of the engine being in the base; which was

placed longitudinally in the sleigh about the middle of the box, not secured in any way. At a place near plaintiff's residence there was a bridge, the approach to which was steep, being a rise of something over three feet in fifteen, with a log approximately four inches high laid at the immediate end of the planking of the approach, so that it formed an upright shoulder against which a vehicle would strike in coming up the grade. Plaintiff was familiar with the situation. As they reached the foot of this slope plaintiff got out of the sleigh, in which he was sitting behind the engine, and walked immediately behind. As the vehicle neared the top of the slope, he saw the engine commenced to tip, shouted "Whoa!" but momentarily the sleigh struck the log above mentioned, and the engine tipped over backward onto him before he could get away, causing him considerable personal injuries. The testimony of both himself and father-in-law is that the horses were being driven at a slow walk, and carefully; that they had passed over several steep places, and the engine had not shifted or tipped at all. Upon a general verdict in favor of the plaintiff, followed by the usual motion to set aside and grant a new trial, judgment was entered, from which the defendant appeals.

Aldro Jenks, for the appellant.

For the respondent there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

DODGE, J. Appellant's principal contention is that the evidence conclusively establishes contributory negligence either on the part of the plaintiff or on the part of Mr. Barry, who was driving the team. Negligence and contributory negligence are essentially and peculiarly questions for the jury. They involve not only a decision upon the credibility of the testimony, and deduction therefrom as to the physical facts and the actual conduct, but also an inference of negligence or due care from such facts and conduct. *Warden v. Miller,* 112

Wis. 67, 70. In the consideration of such contention as now made by appellant, of course the evidence must be given its utmost force in favor of the plaintiff, and all reasonable inferences must be indulged in his favor. Only when this court can say that there is no conflict of credible evidence as to the facts, and that from those facts, taken most adversely to the appellant, no reasonable mind could draw the inference of ordinary care, can such contention be sustained. We do not feel that such a situation is here presented. There was evidence that the team was being driven carefully and slowly; that the engine itself was so constructed, balanced, and situated as to render its capsizing improbable; that it had been subjected to various experiments in course of the journey, all tending to allay any fear of such event. The plaintiff did not forego all precautions, but, realizing that the place in question was a difficult one, he withdrew from a position of special proximity to the engine, and, doubtless partly to lessen the load and partly also to be further from the engine, got out of the sleigh and walked behind. With the team thus moving and apparently under control, we cannot say that the inference is beyond question that he, as an ordinarily prudent and intelligent man, should have foreseen the probability of the engine tipping over so suddenly as to injure him. The conduct of the ordinarily prudent man is quite as much within the experience and knowledge of jurymen as of courts, and their decision has been subjected to criticism before the trial judge, who has refused to disturb it. We cannot feel justified, upon this record, in reaching a different conclusion.

Appellant also assigns as error refusal of an instruction that, "if the plaintiff placed himself in a position of known danger, when he might have avoided it, and while there received the injury of which he complains, he was guilty of negligence, although the danger may have been caused by the negligence of the town authorities." The instruction in fact given was that, if he failed to exercise such care as the great

mass of mankind ordinarily exercise under the same or similar circumstances, he could not recover. Doubtless it would have been entirely proper for the court to have instructed the jury that a knowledge of danger was one of the surrounding circumstances and conditions which would require a higher measure of care or precaution than if such danger were not known; but under familiar rules no error can be predicated upon the refusal of a requested instruction, unless it be complete and accurate in itself, so that it can be given in the words of the request. Sec. 2853, Stats. 1898; *Schroeder v. W. C. R. Co.* 117 Wis. 33, 42, 93 N. W. 837; *Taylor v. Seil,* 120 Wis. 32, 97 N. W. 498. This requested instruction lacks two important qualifications essential to its accuracy: First, that the injury did actually result from the conduct of the plaintiff; and, secondly, that an ordinarily prudent man should, under all the circumstances, have reasonably anticipated some injury as the result of such conduct. Mere carelessness does not prevent recovery by the plaintiff, unless it be negligence; that is, unless an ordinarily prudent man would have anticipated the probability of some injury. *Rhyner v. Menasha,* 107 Wis. 201, 208, 83 N. W. 303. Nor can it defeat the action unless it did in fact contribute. *Cummings v. National F. Co.* 60 Wis. 603, 616, 18 N. W. 742, 20 N. W. 665. No error was committed in refusing the request.

By the Court.—Judgment affirmed.

TEESDALE, Respondent, vs. BENNETT, Appellant.

November 19—December 13, 1904.

Brokers: Contracts: Commissions: Substituted agreement: Court and jury.

1. Where there is a conflict as to what was the original agreement between a real-estate broker and the owner, that issue is one necessarily to be determined by the jury.
2. In an action by a real-estate broker for commissions alleged to have been earned, the evidence, stated in the opinion, is *held* not to sustain a contention that the original agreement was superseded by a subsequent contract between plaintiff, defendant and a third broker.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Plaintiff was a real-estate dealer, doing business in the city of Lancaster, Wisconsin. Defendant was the owner of certain hotel property known as the "Lancaster House." May 9, 1903, he entered into negotiations with plaintiff with a view to disposing of the hotel. Plaintiff had various conversations with him, and claims to have made an agreement with him to the effect that defendant was to pay him $500 for securing a customer for a sale, or for an exchange of this property for other property, which would be satisfactory to defendant. Defendant claims that the agreement for the payment of $500 related only to a cash sale, while plaintiff claims that it covered a sale or a satisfactory exchange. Plaintiff testified that defendant agreed with him that if plaintiff would bring a customer who had property to exchange for the hotel, and if the terms of exchange could be satisfactorily arranged, he would have the money ready for plaintiff as soon as the deal was closed. Plaintiff specified several instances wherein he had attempted to arrange an exchange, and, as to the particular exchange which was consummated, stated that he knew a Mr. Horton, who lived on a farm about a mile from

Fennimore, who had some lots and houses in Lancaster which he desired to exchange; that he knew the prices at which these properties were held; and that he suggested an exchange thereof to defendant for the hotel. The prices and the properties were satisfactory to defendant. Plaintiff and defendant thereafter went to plaintiff's office to get into communication, and plaintiff suggested that it would facilitate an exchange to obtain the assistance of one of the real-estate agents at Fennimore, and in defendant's presence sought to reach a Mr. Armfield, such an agent, by telephone. Failing to reach Mr. Armfield, he communicated with Armfield's partner, Mr. Parker. An arrangement was made whereby plaintiff and defendant went to Fennimore that afternoon, met Mr. Parker, of the firm of Armfield & Parker, and the three together drove to the Horton farm to see what could be done toward making an exchange. Plaintiff testified that while on the way to the Horton farm he informed Mr. Parker of the agreement he had made with defendant, whereby he was to receive $500 for procuring a satisfactory exchange, and he told him that he would divide the commission with his firm—Armfield & Parker—if they would assist him in consummating the exchange; that Parker assented thereto, and, when defendant heard plaintiff promise Parker to share the commission equally with Armfield & Parker, defendant said, "Yes, boys, the money is ready for you as soon as the matter is closed." Plaintiff claims that this whole transaction was an employment of Armfield & Parker as his subagents, while defendant contends that, if plaintiff is entitled to recover at all, it must be upon a new agreement then made, whereby plaintiff and Armfield & Parker were to share equally in the commission. Defendant denies that any such conversation was had between plaintiff and Parker in his presence, and denies making the statement that the money would be ready if they carried the deal through. Parker testified that he had such a conversation with plaintiff on the way to the Horton

farm, while riding with defendant, and in this conversation plaintiff promised to divide the $500 commission, and that defendant stated in effect that, if they would put the deal through, the money would be ready for them. At the Horton farm all three participated in the conversation wherein the exchange was discussed. Horton promised to come to Lancaster as soon as possible to look over the hotel with a view to completing the exchange. Plaintiff testified that he made two or three trips to Fennimore to urge Horton to come to Lancaster, and that he was constantly engaged in furthering the consummation of the deal. On May 29th Horton came to Lancaster with Armfield, then the partner of Parker, and on the 30th plaintiff went to defendant and notified him of the presence of Horton, and he testifies that defendant at that time said: "Now, Teesdale, you have the man; you have done your duty, and I will go ahead and complete the terms." At this time the arrangements for the exchange were made between Bennett and Horton in the presence of Armfield, and the transfers were duly made on the following 10th of June. Defendant denies the making of any arrangement for procuring an exchange, and claimed that, if plaintiff was entitled to recover, it must be on a contract made while on the way to the Horton farm. Instructions based upon this claim were refused, and the case was submitted to the jury upon the plaintiff's right to recover on his complaint, and a verdict was returned by the jury for the amount claimed. The court refused to set aside the verdict, and also refused a new trial, and judgment was entered in accordance with the verdict. This is an appeal from such a judgment.

The cause was submitted for the appellant on the brief of *Geo. B. Clementson,* and for the respondent on that of *Lowry & Carthew.*

SIEBECKER, J. Plaintiff, as a real-estate agent, sued defendant for commissions which he claims are due him upon

the contract made at the time and under the circumstances stated in the foregoing statement of facts, whereby he undertook to procure a customer for the purchase or exchange of defendant's hotel property in the city of Lancaster. He avers that he has fully performed all the conditions of this agreement, and that the sum agreed upon as a commission for such services is due him. The defendant asserts that the terms of the agreement were that plaintiff should receive the commission if he procured a purchaser for a cash sale at the specified price, but he denies that such a sale was consummated. He furthermore contends that upon plaintiff's own showing it appears that, if he is obligated to pay any commission for the exchange of the properties, it was upon the agreement whereby plaintiff and Armfield & Parker, jointly, undertook to procure and consummate the exchange and divide the commission equally between them. There is no question but that a clear conflict arose upon the evidence as to what agreement was originally made between plaintiff and defendant, and that this issue was one necessarily to be determined by the jury. The court so submitted it, and the question is, does their verdict settle the controversy?

It is insisted that the court erred in refusing to submit to them the inquiry whether the original agreement was superseded by a subsequent one between plaintiff, defendant, and Armfield & Parker. The foregoing statement contains the substance of the evidence bearing upon this question. We find no facts which support the contention. The only transactions on which the claim is predicated are the occurrences while defendant, plaintiff, and Parker were driving to the Horton farm, when the first interview was had with a member of the firm of Armfield & Parker. It appears that plaintiff and defendant met Parker at Fennimore, by mutual arrangement made in the forenoon of the day, to drive to Horton's farm to negotiate with him for an exchange of the hotel property. The defendant denies that he made any agreement

at this or any other time with either the plaintiff or Parker, and also denies that he said or heard anything said between plaintiff and Parker concerning the making of an agreement whereby plaintiff and the firm of Armfield & Parker were to act as defendant's agents to consummate the trade with Horton. The evidence, therefore, negatives the claim that the original agreement was superseded by a subsequent one. We must then ascertain what arrangement was then made between plaintiff and Parker. The plaintiff's testimony is to the effect that he informed Parker of his contract with defendant, by which, if a trade could be effected with Horton, he (plaintiff) would receive $500 as a commission, and that he made an offer to Parker that, if he and Armfield would assist him in bringing about an exchange of the properties, he "would share" the commission with them, and that defendant heard this interview and stated "Yes, boys, the money is ready for you as soon as the matter is closed." Mr. Parker's testimony of this transaction is to the same effect. We have thus the claims of the three parties to the transaction; the defendant testifying that nothing was said or heard by him on the subject of the contract, and the claims of plaintiff and Parker, who assert that plaintiff engaged Armfield & Parker to assist him to negotiate the exchange between defendant and Horton. The transaction thus shown is lacking in all the essential elements requisite to constitute a contract between defendant on the one part and plaintiff and Armfield & Parker on the other. It fails to show a situation of a common intent of all the parties, and it does not appear that their minds met upon any such terms of agreement as now claimed by the defendant. We find no basis that would have authorized a jury in finding either an express or an implied agreement. Hammon, Contracts, § 12; 9 Cyc. 245.

This conclusion disposes of all the exceptions urged upon this appeal. Since the jury found an agreement was made between plaintiff and defendant, as alleged in the complaint,

it follows that plaintiff was entitled to recover the commission as agreed upon. *Leech v. Clemons,* 14 Colo. App. 45, 59 Pac. 230; *Mullen v. Bower,* 26 Ind. App. 253, 59 N. E. 419.

By the Court.—Judgment affirmed.

SULLIVAN, Respondent, vs. MAUSTON MILLING COMPANY, Appellant.

November 19—December 13, 1904.

Contract, sale or bailment? Evidence: Prior transactions: Cross-examination: Admissions: Instructions to jury.

1. While evidence of previous independent transactions is inadmissible unless it tends to prove motive, intent, or custom, yet where it appears that in making a contract, reference was distinctly made to a previous transaction of a similar character, and that it was then agreed that plaintiff might deliver grain, and take the price later on, as was done on the former occasion, the terms of the former transaction are, in effect, imported into the bargain, and evidence as to its terms is made competent.
2. Where, in an action for the price of grain, the defense was that the grain had been stored instead of purchased, and the defendant's manager had testified that it was in the habit of storing grain for others, it is proper to cross-examine such manager as to former transactions with the plaintiff and others.
3. Where there was evidence tending to prove admissions by both plaintiff and defendant, and plaintiff admitted making only part of the alleged admissions, a general instruction on the subject of admissions, stated in the opinion, is *held* not to have misled the jury as to the admission which plaintiff acknowledged he made.
4. Instructions to the jury, commenting on the items of testimony, considered, and *held* not to violate the rule that in so doing all the essential facts on both sides should be covered.

APPEAL from a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover the purchase price of a quan-

tity of oats. The plaintiff is a farmer, and the defendant operates a mill and elevator at Mauston, Wisconsin, and buys, sells, and stores grain. In September, 1902, plaintiff delivered the oats in question at the defendant's elevator, and received a grain ticket acknowledging receipt thereof. Thereafter the elevator burned, without fault of the defendant, and the oats were destroyed. The plaintiff claimed that the defendant purchased the grain, while the defendant claimed that the grain was simply left on storage, and this was the only question of fact in the case. The jury returned a verdict for the plaintiff, and, judgment being rendered thereon, the defendant appeals.

For the appellant there was a brief by *Barney & Price,* attorneys, and *Sanborn & Sanborn,* of counsel, and oral argument by *A. L. Sanborn* and *J. B. Sanborn.*

For the respondent there was a brief by *Veeder & Veeder,* and oral argument by *C. A. Veeder.*

WINSLOW, J. The errors claimed will be discussed in their order.

1. Testimony was allowed on behalf of the plaintiff as to a previous transaction between the parties in 1899, by which plaintiff delivered a quantity of grain to the defendant under an arrangement for sale similar to the one here claimed, and this ruling is attacked as erroneous. The rule that evidence of previous independent transactions is inadmissible unless it tends to prove motive, intent, or custom is well understood; but in the present case the plaintiff testified directly that, in making the arrangement in question, reference was distinctly made to the previous transaction, and that it was agreed that he might deliver the grain, and take the price later on, as was done on the former occasion. If this was true, its effect was to import the terms of the former transaction into the bargain, and this clearly made the terms of that transaction competent.

2. Plaintiff was allowed to cross-examine the president and manager of the defendant's business as to former transactions with the plaintiff and others, and this is assigned as error. It appears that upon his direct examination the witness testified that the defendant was in the habit of storing grain for others. The purpose and necessary effect of this testimony was to support an inference that the present transaction was a storing of grain in accordance with the general habit. Such testimony having been given by the party himself, it was entirely competent to cross-examine as to this habit, and show, if possible, whether it was universal or otherwise. Somewhat greater latitude is allowed upon cross-examination of a party than of a mere witness. *Schultz v. C. & N. W. R. Co.* 67 Wis. 616, 31 N. W. 321.

3. There was evidence tending to prove admissions by both plaintiff and the defendant's manager, and the court gave the jury the following general instruction with reference to this testimony:

"The law regards the admission or statement of a party ordinarily as the weakest kind of evidence, for the reason that an admission or statement of a party is liable to be mistaken in one way or more ways. These statements sometimes are not distinctly and clearly understood when they are claimed to have been made by the party to whom they are made; they are not always remembered word for word by the party to whom they are made; and for this reason the law regards the admissions or declarations of persons out of court, casually made to different ones, as the weakest kind of testimony; that again, on the other hand, if those admissions or statements are deliberately made—understandingly made—by the party who makes them, and are clearly understood by the party to whom they are made, and correctly reported in court, then they are considered as strong evidence, providing they were clearly understood, clearly remembered, and correctly reported upon the witness stand. So you are to consider all these contingencies in regard to the manner of their being understood, their being made, and their being correctly reported in weighing them."

The defendant does not question the correctness of these propositions, in the abstract, but claims error because the plaintiff admitted and explained certain of his alleged admissions; and hence it is said that there was no question about their being clearly understood or remembered, and the instruction, as applied to the case in hand, was misleading. Examination of the record shows that the plaintiff admitted making only a part of the alleged admissions, but even had he admitted all of them, that part of the charge which says that admissions deliberately made and clearly. understood and remembered are considered as strong evidence would necessarily apply, and the jury would unquestionably receive the correct idea as to the admissions which the plaintiff admitted that he made.

4. It is said that the trial judge, in commenting upon the items of testimony which tended to throw light upon the transaction, unfairly called attention to testimony favoring the plaintiff, and omitted or slighted testimony favoring the defendant. The rehearsing of the testimony is a delicate task, and it may be questioned whether it is wise to attempt it when the facts are at all numerous or complicated. If done at all, it should cover all the essential facts on both sides. In the present case we are referred to no facts which were omitted, and, on examination, we have discovered nothing essential in that line.

By the Court.—Judgment affirmed.

HANEY SCHOOL FURNITURE COMPANY, Appellant, vs. MEDARY, Respondent.

November 21—December 13, 1904.

Contracts: Bond securing notes: Construction: Renewals.

In an action against the surety on a bond securing certain promissory notes of the principal, a provision of the bond, that "said notes may be from time to time renewed during" the term of the bond, is construed to mean that the obligee may take renewals without affecting the liability of the surety, and not as securing to the principal the privilege to renew from time to time as notes fell due during the term of the bond.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action by the obligee to recover of the surety for breach of a bond, the material portions of which are as follows:

"Know all men by these presents, That we, C. F. Lockwood and *J. S. Medary* are bound unto the *Haney School Furniture Co.* in the penal sum of two thousand dollars, for payment of which . . . we bind ourselves . . .

"Sealed with our seals and dated this 16th day of May, 1900.

"Whereas,—the said Lockwood has been for some time and now is indebted to said *Furniture Company* upon notes which have been from time to time renewed and upon open account, . . . and said *Medary* has been surety for said Lockwood to the extent of two thousand dollars under a bond covering the transactions of one year subsequent to May 16th, 1899, and said Lockwood has been and is continuing to make payments on such indebtedness, and said *Company* is willing to renew and carry said notes in consideration of this bond, which is given in substitution and exchange for the aforesaid bond.

"Now therefore, the condition of this obligation is such that if within one year, or at the expiration of any renewal notes given during the year said Lockwood shall pay said notes and all renewals therefor, then this obligation shall be void.

"It is agreed that the said notes may be from time to time renewed during the said year and for the period customary in bankable paper, and that the liability of the surety hereunder shall in no event exceed the sum of two thousand dollars.

"C. F. LOCKWOOD. [Seal.]
"J. S. MEDARY. [Seal.]"

The breach alleged was that a renewal of the notes mentioned occurred March 11, 1901, all being put in one note for $2,538.35, due May 16, 1901; that neither the original notes nor any of the renewals were paid within one year from the date of the bond or thereafter, and that June 26th after the maturity of the last renewal mentioned, and after the maturity of the bond, due demand was made for payment by the surety of the sum of $2,000, and that the same was refused.

The defendant pleaded that plaintiff breached the bond, in that when the note of March 11, 1901, became due it refused, upon due request therefor, to renew the same. The evidence was to the effect that there was such refusal. A verdict was directed in favor of the defendant and judgment was rendered accordingly.

For the appellant there was a brief by *McConnell & Schweizer,* attorneys, and *Taggart, Denison & Wilson,* of counsel, and oral argument by *J. E. McConnell* and *A. C. Denison.*

For the respondent there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.*

MARSHALL, J. The only question for decision is: Did the provision at the foot of the bond that "said notes may be from time to time renewed during the said year" secure to the maker thereof the privilege to renew from time to time as notes fell due during one year, or was its purpose to enable the obligee to take renewals without affecting the liability of

the surety? The court below took the former view. Very little light can be shed on the subject as to which view is correct by referring to the authorities, or by discussion. None but very familiar rules for construction furnish aid in the matter. The general features of the bond indicate pretty clearly an intention that the renewals should not be taken, due after one year from its date. If such renewals had been taken respondent would very likely have claimed, and with reasonable ground therefor, a fatal breach of the bond. It seems pretty clear that the sole consideration for the instrument was the first renewal of the notes. The words "renew and carry said notes" refer to one renewal only. While it was contemplated that there might be re-renewals, it being said in effect, that payment of renewals should extinguish the bond, no obligation for such renewals is mentioned in the consideration. The plain purpose at that point seems to have been that in case of renewals, payment thereof should have the same effect as the payment of the original paper. The language which follows: "It is agreed that the notes may be from time to time renewed during the said year," etc., "and that the liability of the surety hereunder shall in no event exceed two thousand dollars," does not seem to have been used to secure to the principal obligor an advantage, but to give a carefully guarded privilege to the obligee, as between it and the surety. It says to the latter, you may favor the principal obligee by renewals within one year, without releasing the liability of the surety to you, it being understood, however, that in no event shall the latter's liability exceed two thousand dollars. If that is the correct construction of the instrument, and we are constrained to hold that it is, appellant was not bound to renew the notes when requested to do so May 10, 1901, and the refusal to do so did not release the surety.

It seems that the learned trial court may have been persuaded to adopt a contrary view to the conclusion we have

reached by applying the rule that in case of uncertainty as to which of two reasonable meanings of an instrument affecting the liability of the surety is the proper one, that one should be adopted which is most favorable to him. We are unable to discover in the situation before us such uncertainty. We note that the learned counsel for respondent gives much significance to the words "renew and carry said notes in consideration of this bond," as suggesting renewals from time to time during the year. It was so easy to use language plainly indicating that, if such was the intention, the omission to use it persuades strongly to the conclusion that the willingness *in præsenti* to renew refers to one renewal, and that the word "carry" refers to the original note, the idea being that whether the indebtedness remained evidenced by the latter or by renewals, the obligee was willing to carry the same for one year. While plainly appellant obligates itself to renew the notes existing at the date of the bond, if desired, the surety just as plainly bound himself for payment of the indebtedness evidenced by such notes, whether the same remained evidenced thereby or renewals thereof, if they were not paid by the maker within one year. The words "pay and discharge the aforesaid notes," (meaning those existing at the time the bond was made) "and all renewals therefor," make that plain. So "renewals" at that point refer to presently existing notes, not re-renewals. Otherwise the added clause providing for such renewals would be merely surplusage. A construction of an instrument which treats language apparently deliberately incorporated therein in regard to an important matter as useless, is not to be adopted if it can reasonably be avoided.

By the Court.—The judgment of the circuit court is reversed and the cause remanded for a new trial.

TATE, Appellant, vs. JERMAN, Respondent.

November 21—December 13, 1904.

Appeal and error: Affirmance or reversal.

Where the evidence discloses no clear preponderance against the material findings of fact, the judgment is affirmed.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Plaintiff and defendant owned, respectively, lots 2 and 3 in block 6, in Viroqua, fronting easterly on Main street and divided by an east and west line. Plaintiff owned a store located something less than six feet south of the lot line, with platform and outside stairway extending some three and one-half feet further toward that line. Defendant had buildings on his lot, located about ten feet north of said dividing line, and in 1902 undertook to build a building on that ten-foot space. Plaintiff brought this action to enjoin such building, alleging that in or about the year 1857 the owner of defendant's lot 2 granted to the owner of lot 3 an easement for a right of way across the south six feet of lot 2, and lot 7, which lay immediately west of it, to be used by the owner of lots 3 and 6 forever, and that since the year 1865 the plaintiff had been in the quiet and peaceable enjoyment and use of the alleyway so granted. No direct evidence was offered of any such grant, but was confined to proof of continuous passage over an alleged alleyway consisting of six feet off of plaintiff's lot 3 and six feet off of the south side of defendant's lot 2; it appearing, however, that during most of said period the plaintiff had exercised the right to build structures in the north six feet of her lot. There was evidence that plaintiff's lot, together with all the rest of the one half of the block, had originally been the location of the county buildings, and that, before any buildings had been erected on plaintiff's lot, the county, in fencing its half block, left out a strip of six feet

or more which it had used as a passageway to the interior of its premises; that plaintiff's predecessor in title erected a building on lot 3 about 1858, and used said strip of land for a passageway, and that plaintiff, after the purchase of the premises in 1865, continued to so use the same; that the defendant purchased from the county in 1881, erected buildings on his lot 2, and thenceforward, by himself and tenants, had also used this passageway for travel, but also had constructed, within the limits thereof, a cellar stairway, had occupied the same for the storage of wood, and at times had granted the privilege of occupying it for business purposes to others; that said alleyway through the block had currently been traveled, as occasion arose, by the public generally; that plaintiff had frequently made claim that a public right of passage existed through said alley, which defendant had at all times denied; that no express claim had ever been made by plaintiff of any private right or easement. There was also some evidence of request by plaintiff, and permission by defendant, for the doing of certain acts by the former within the six-foot space described. The court found the original use and occupation of this strip by the county, and, after his purchase, by the defendant for his own purposes; that the plaintiff, in common with the public generally, had for many years used the strip; that the use by the plaintiff was never exclusive, hostile, or adverse, nor even under a claim of right, except as a public highway, and that from the year 1883 the use had been by express permission and license of the defendant; and that the use by the plaintiff had not continued uninterrupted for twenty years prior to the bringing of the action; whereupon judgment dismissing the complaint was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Smith & Griffin* and *H. P. Proctor,* and oral argument by *C. J. Smith.*

C. W. Graves, attorney, and *E. C. Higbee,* of counsel, for the respondent.

DODGE, J. Careful examination of the evidence discloses no clear preponderance against the material findings of fact, from which judgment for defendant necessarily results. *Frye v. Highland,* 109 Wis. 292, 85 N. W. 351.

By the Court.—Judgment affirmed.

LOWE, Appellant, vs. RING, Respondent.

November 21—December 13, 1904.

Corporations: Contracts: Compensation of president: Evidence: Former trial: Res adjudicata: *Special verdict: Duplicity: Uncertainty: Interest: Instructions to jury: Appeal and error: Exceptions.*

1. The president of a corporation cannot maintain an action upon an implied contract to enforce a claim for services as an officer, when he is also a stockholder or director.
2. On an issue on a claim for compensation for the services of defendant as president of a corporation, it appeared, among other things, that defendant had interviews with individual members of the board of directors at times other than at board meetings; that at one meeting of the board the defendant called attention to his claim for compensation, and was met with objection that the corporation ought not to pay for such services, and that no action was taken by the board. *Held,* that such state of the evidence left the case without proof of any express contract that defendant should receive a salary for his services as president.
3. In such case, on a former trial, defendant had recovered on an express contract. On review of the evidence given on both trials it was *held* that there were material differences in the proofs bearing on that issue.
4. On the trial of an issue on a claim for compensation for the services of a president of a banking corporation, the court submitted as part of a special verdict this question: "Was there a contract, express or implied, between R. and the bank, that R. should receive a salary from the bank as president," which was answered by the jury "Yes." *Held,* that the question was faulty for duplicity, and fatally defective for uncertainty.
5. An instruction to the jury with reference to the allowance of interest on the amount found due: "After you have determined

such amount, you will compute interest thereon at the rate of six per cent. per annum from the date those services were completed pertaining to such matter, and the total amount of interest and value so found by you will be the sum which you should insert in your answer," is erroneous, since interest does not run until a demand has been made sufficiently specific to inform the debtor of the claim made and to enable him to ascertain what amount, under the circumstances, he ought to pay.

6. An instruction to the jury, that the conduct of the officers and agents of a corporation in respect to the payment of a salary to the president for his official services would bind it under the same circumstances as an individual, is erroneous.

7. General exceptions taken to portions of the charge to the jury which includes two or more distinct propositions, do not present any question for review.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This action was brought to recover on several promissory notes, which were executed by the defendant to the Clark County Bank, and assigned by it to the plaintiff, who now claims to own them. Upon the trial the plaintiff claimed the right to recover on these two notes. The court awarded judgment in his favor because the testimony showed without dispute that he was entitled to recover thereon. No complaint is made of this ruling. The defendant alleged a number of counterclaims as offsets to any amount of the plaintiff's claim. The case has been before this court on two former appeals, and the decisions of this court are reported in 106 Wis. 647, 82 N. W. 571, and 115 Wis. 575, 92 N. W. 238. The pleadings and material facts of the case are set forth in the report of these former appeals, and need not be repeated in detail. Upon this trial, which resulted in a judgment in defendant's favor, the jury found that plaintiff was entitled to recover under his complaint the amount due him on the two notes, with interest, in all $3,563.30, and that defendant was entitled to recover on his counterclaims the following amounts: For attorney's services in collecting the Kirkland note, $225;

for like services in the Christie case, before the dissolution of the partnership with Youmans, $878, and after such dissolution, $67; in the Frank W. Archer case, $135; in the case of Mrs. S. B. Hewell, $195.60; as administrator of the estate of Levi Archer, $530 (reduced by the court to $300); in the case of Hill and Kinsey vs. Archer, $149; and compensation by way of salary as president of the bank, $1,675. The jury also found that any of these amounts which were originally due the firm of Ring & Youmans had been assigned to the defendant, and that he was the sole owner. Each finding, in answer to the questions of the special verdict pertaining to the foregoing counterclaims, is the amount due for services, with interest added. It was claimed that all of these amounts were due defendant from the bank after the notes matured, and before it assigned them to plaintiff, and that they constituted set-offs against any amount due on them. The issues on these counterclaims were submitted to the jury by special verdict, requesting them to find upon each claim whether there was a contract, "express or implied," between the bank and defendant or Ring & Youmans, his assigns, which provided that he (or they) should receive compensation from the bank for the services rendered in the matters covered by the various counterclaims. The plaintiff requested certain instructions, which were refused, except in so far as covered by the instructions given by the court. There was a motion by plaintiff to strike out the affirmative answers of the jury to questions Nos. 13, 14, and 15, and that the court answer them in the negative, and to set aside the verdict, and for a new trial, upon the ground that the verdict was contrary to the law and the evidence, and for errors committed in the instructions given. These motions were denied. Judgment was entered dismissing the complaint. This is an appeal from such judgment.

The cause was submitted for the appellant on the brief of *L. M. Sturdevant* and *Chas. F. Grow,* attorneys, and *R. M.*

Bashford, of counsel, and for the respondent on that of *S. M. Marsh,* attorney, and *James Wickham,* of counsel.

SIEBECKER, J. Numerous errors are assigned and urged upon our attention. One of the grounds assigned as error pertains to defendant's right to recover compensation for services rendered as president of the bank. The issues upon this claim were submitted to the jury for determination by questions Nos. 19 and 20 in the special verdict. Question 19 was as follows: "Was there a contract, express or implied, between Ring and the bank, that Ring should receive a salary from the bank as president? " This question the jury answered in the affirmative. It is contended that the proof bearing on this issue is materially different upon this trial from that upon the former trial, wherein this court held that there was testimony from which a jury might infer an express contract between defendant and the bank, whereby it agreed to pay the defendant a salary for his services as president of the bank. After a painstaking examination of the evidence of both trials, in so far as it is before us, we find that there is a material difference upon this question. On the former trial there was evidence tending to show that the defendant at a meeting of the board of directors demanded that he be compensated for his services as president after his election to that office, and was then informed by the members of the board that the corporation expected to pay him a reasonable compensation for such services, though no formal action was taken fixing the amount. It also appeared that defendant placed reliance on such promises in continuing his services as president. This evidence called for submission of this issue to the jury, though the evidentiary facts thus adduced were not of a strong and conclusive character. Upon this trial no such evidence was adduced. There is evidence that defendant had interviews with individual members of the board at times other than at board meetings; that at one

meeting of the board defendant called attention to his claim for compensation and was met with the objection from a member of the board that the bank ought not to pay for such services, and that no action was taken by the board. We have discovered no other evidence on this question, nor do counsel point to any in the record. This state of the evidence leaves the case without proof of any express contract that defendant should receive a salary for his services as president.

The question in the special verdict upon this issue was to the effect that, if there was an implied contract between the bank and defendant to pay for these services, the bank became liable therefor. The submission of this question was error. A president of a corporation cannot sue upon an implied contract to enforce a claim for services as an officer, when he is a stockholder or director. The adjudications are to the effect that such officer must show an express contract for compensation as a basis for such a claim. Though this question was not before the court for decision on the first appeal, it is apparent from the questions decided that the court entertained this view. Among the authorities in support of this rule are the following: 2 Cook, Corporations, § 657; *Commonwealth Ins. Co. v. Crane,* 6 Met. 64; *Illinois L. Co. v. Hough,* 91 Ill. 63; *Farmers' L. & T. Co. v. H. R. Co.* 152 N. Y. 251, 46 N. E. 504; *Fitzgerald & M. C. Co. v. Fitzgerald,* 137 U. S. 98, 11 Sup. Ct. 36; *Sears v. Kings Co. E. R. Co.* 152 Mass. 151, 25 N. E. 98. The cases in seeming conflict with this ruling generally present the distinguishing features that the services rendered for which recovery was claimed were either for extraordinary services rendered outside the usual official duties, or cases where a person other than a director or stockholder accepted an election to such a position under some person or body authorized to elect and employ some one not considered with the corporation.

We encounter another difficulty in this question of the special verdict, which also affects the other questions submitted

to the jury, whereby they were to find whether there was a contract, "express or implied," that defendant should receive compensation for the services specified in the several counterclaims. The questions propounded are framed alike in this respect. The one relating to his salary was whether there was an "express or implied" contract for compensation. To this the jury answered "Yes." This answer not only leaves it uncertain whether the jury found there was an express or implied contract between the parties, but we are unable to ascertain whether the jury *agreed* that either contract was made. A part of them may have found there was an express contract, but no implied one; and the others may have reached the conclusion that there was an implied, but no express, contract. Thus it is rendered uncertain whether the jury in fact determined this issue. This difficulty could probably have been successfully avoided by an appropriate instruction directing the jury to the effect that, whichever fact they found, under the alternative inquiry of this question, must be assented to by all the jurors. But no such information was conveyed to them. Under these circumstances the question is faulty for duplicity, and is fatally defective for uncertainty as to the determination of the issue. *Carroll v. Bohan,* 43 Wis. 218; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Gehl v. Milwaukee P. Co.* 116 Wis. 263, 93 N. W. 26. It may aid in framing single, direct, and plain questions to omit the words "express or implied" from the question of the special verdict on this and like issues, and embody the necessary information which the jury should possess as to the two classes of contracts in an instruction with a direction that, in order to find either contract as a fact in the case, the assent of all the jurors is necessary to make it a valid verdict. The questions of the special verdict covering the other counterclaims is open to the same objection, which leaves the material issues of the several

counterclaims undetermined, and renders a new trial of the action unavoidable.

Some other errors are alleged and presented, which should be noted in view of the fact that a new trial must be had. The court instructed the jury with reference to the allowance of interest on amounts found due defendant for services as follows:

"After you have determined such amount, you will compute interest thereon at the rate of six per cent. per annum from the date that these services were completed pertaining to such matter, and the total amount of interest and value so found by you will be the sum which you should insert in your answer."

Under the decisions of *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327, and *Remington v. Eastern R. Co.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321, interest should not run until a demand has been made "sufficiently specific to inform the debtor of the claim made" to enable him to ascertain what amount, under the circumstances, he ought to pay.

In connection with question No. 19 of the special verdict, the court in effect instructed the jury that the conduct of the officers and agents of a corporation in respect to the payment of a salary to the president for his official services would bind it under the same circumstances as an individual. As we have shown above, this is not the rule between a corporation and its stockholders and directors, when they act as its officers.

Some general exceptions were taken to portions of the charge which include two or more distinct propositions. Under such circumstances the exception does not avail to present any question for review. *Tebo v. Augusta,* 90 Wis. 405, 63 N. W. 1045; *Sheppard v. Rosenkrans,* 109 Wis. 58, 85 N. W. 199; *Dean v. C. & N. W. R. Co.* 43 Wis. 305; *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129.

Other errors assigned pertain principally to questions de-

cided upon the former appeals, and nothing can be added to what is there stated. The exception to the court's ruling upon the objection to the cross-examination of plaintiff and Mr. Youmans as to transactions with the bank is not likely to arise upon another trial, so we need not examine it.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SMITH, Respondent, vs. WILLING, Appellant.

November 21—December 13, 1904.

Bills and notes: Negotiability: Blanks: Authority to fill: Judgment on cognovit: Action on such judgment: Defenses: Estoppel.

1. A promissory note was upon a printed form which, after the printed words "pay to the order of," contained a single blank line terminating in the word "dollars." In this blank line the words "twenty-five hundred" were written at the extreme left, so as to leave no space whatever in front of them for the name of a payee, and were joined to the printed portion without physical break or separation. A warrant of attorney, embodied in the note, provided that judgment might be confessed in favor of the holder. *Held:*

   (1) That part of the writing which sought to express the promise made, showed an intent that it be payable only to some person, or that person's order, and negatived intent to make it payable to whoever might happen to acquire possession, without indorsement, from the original payee.

   (2) The mere authority to confess judgment in favor of the holder was insufficient to overcome the clear declaration that the note was payable to the order of a person intended to be named, but who by mistake was not named.

   (3) It being a promise to pay, other than to bearer, which was not certain as to the payee, it was not negotiable.

2. In such case, the writing being joined to the printed portion without physical break or separation, the omission of the name of the payee was not the leaving of a blank which the plaintiff, as possessor, was thereby impliedly authorized to fill.

3. Defendant executed a note, with warrant of attorney, intending to become liable to a bank for money loaned by it to his son personally, and refused to become liable thereon for pre-existing debts of a corporation of which his son was president. The note was non-negotiable by reason of omission to name any payee. Plaintiff, being a creditor of the corporation, took its note, and received defendant's note as collateral. Such corporation became bankrupt and ceased to exist. Thereafter judgment on cognovit was entered in Illinois, and action brought on that judgment in the proper Wisconsin court. *Held*, that the instrument being non-negotiable the plaintiff could gain none of those technical advantages which run with negotiable instruments, and, it being an attempt to enforce a liability defendant never had agreed to assume, a defense of non-liability was meritorious and equitable.
4. Plaintiff took, as collateral, from a corporation of which defendant's son was president, a note of defendant which failed to name any one as payee. There was no express representation of authority to use the note as collateral, and plaintiff, when he took the note, failed to observe the absence of any payee's name, and did not require the person from whom he obtained the note to indorse it. *Held*, that plaintiff was precluded from any right to invoke estoppel.

CASSODAY, C. J., and MARSHALL, J., dissent.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action upon a judgment of the circuit court for Cook county, Illinois, entered July 24, 1899, without service of process, upon cognovit, based upon a certain writing in following words:

"$2,500.00. La Crosse, Wisconsin, Sept. 2, '97.

Four months after date for value received,—I promise to pay to the order of twenty-five hundred dollars, at the office of People's Bank, Bloomington, Illinois, with interest at seven per cent. per annum until paid.

"And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such an amount as may be due and also for such an amount as may become due there-

on, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, or in execution thereon, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof."

"JOHN WILLING."

That note was upon a printed form which, after the words "pay to the order of," contained a single blank line terminating in the word "dollars;" the words "twenty-five hundred" being written at the extreme left of that line, so as to leave no space whatever in front of them for the name of a payee. The plaintiff's attorney, before taking judgment in Illinois, had interlined between the words "pay to the order of" and the words "twenty-five hundred" the name of *Edward E. Smith.* The defenses alleged were, first, that the judgment was taken irregularly under the statutes of Illinois, in that no proof by affidavit was made that the defendant was living, or that some part of the debt was still due; and, as counterclaim, set up the alteration of the note, without authority or right, by the insertion of the name of *Edward E. Smith,* and that *Smith* came into possession of the note fraudulently and without consideration. Judgment was prayed for dismissal of the complaint, and for injunction against further enforcement of the Illinois judgment. There was evidence that the defendant's son, L. G. Willing, being engaged in mercantile business in Bloomington, Illinois, in association with one Nelson, as a corporation, applied to his father for a note to be used at the Bloomington bank for the purpose of obtaining money to buy out his partner, and that accordingly this note was given for that purpose only, the son L. G. Willing, at the same time giving to his father his own note for a like amount; that both parties supposed that the note was payable to the Bloomington bank; that a day or two afterward a negotiation took place with the plaintiff, who was a creditor for goods furnished to said corporation to nearly the amount of $2,500, whereby it was agreed that he should advance, either in money

or goods, so as to bring the debt up to $2,500, should take a note from the corporation, and receive this note as collateral. There is dispute whether L. G. Willing participated in this arrangement, or, as he claims, it was made by the partner Nelson, without his knowledge or participation, he having reached the conclusion that the note was worthless. In the fall of 1898 the Bloomington department store failed, and, on application of its assets, such sum was received by the plaintiff as reduced his debt to about $800. The trial court found that the note was delivered to L. G. Willing by the defendant to enable the former to obtain credit for himself on the same, and refused a requested finding that it was delivered for the purpose of borrowing money at the Bloomington bank. He also found the delivery of the note to the plaintiff for the purpose above stated, and the alteration thereof at the direction of the plaintiff, and concluded that there was due the plaintiff from the defendant the sum adjudged by the Illinois judgment, whereupon judgment for the plaintiff was rendered, from which the defendant appeals.

For the appellant there was a brief by *McConnell & Schweizer,* and oral argument by *J. E. McConnell.*

Benjamin F. Bryant, for the respondent.

DODGE, J. The parties seem not to controvert the proposition that under the law of Illinois, as under that of Wisconsin, a judgment entered upon cognovit under power of attorney, and without service of process or other notice to the defendant, is subject to review either by direct attack on motion, by suit in equity, or by defense when the judgment is made the basis of an action. *Brown v. Parker,* 28 Wis. 21; *Lake v. Cook,* 15 Ill. 353; *Wyman v. Yeomans,* 84 Ill. 403. Nor do they disagree upon the proposition that the judgment of the Illinois court must be accorded exactly the same faith and credit by our courts as it would be given by the courts of Illinois, by virtue of the provisions of the fed-

eral constitution. *Brown v. Parker, supra.* A further proposition as to which there is and can be no dispute is that, however irregular may have been the procedure resulting in the judgment on cognovit, it will be disturbed collaterally only in case of meritorious equitable defense thereto. *Brown v. Parker, supra.*

Plaintiff's principal contention is that this is a negotiable promissory note on either of two theories: First, that, by reason of the provision in the power of attorney embodied in the note that judgment may be confessed in favor of the holder, the silence of the promissory part of the note itself as to a payee is supplied, and the note becomes, by its terms, a note payable to bearer; secondly, that omission of the name of the payee is, in practical effect, the leaving of a blank which any person having possession of the note is thereby impliedly authorized to fill up; the further contention being that, if this is a negotiable promissory note, the defendant has no meritorious defense based upon the agreement, at the time it was given, that it should be used only for a special purpose, since the very purpose of the law merchant is to give such currency and certainty to negotiable paper that equities existing only between the original parties cannot affect subsequent *bona fide* holders for value. *Young v. Ward,* 21 Ill. 226.

The first ground on which plaintiff asserts negotiability, we deem untenable. The part of the entire writing which seeks to express the promise made clearly shows an intent that it be payable only to some person or that person's order, and thus negatives intent to make it payable to whoever may happen to acquire possession, without indorsement from the original payee. The two conceptions are antagonistic. We cannot think the mere authority to confess judgment in favor of the holder sufficient to overcome that clear declaration in the promissory portion. That would be an entirely proper and enforceable provision if some person had been in fact named as payee. It surely would not then suffice to transform the

note into one payable by its terms to bearer. *Nat. Exch. Bank v. Wiley,* 25 Sup. Ct. 70. We cannot avoid the conclusion that the paper on its face shows that a payee was intended to be named but by mistake was not named. That this was the intent is confirmed by the evidence, which shows clearly that both parties to the making of the instrument intended to make it payable to the order of the People's Bank of Bloomington, and supposed they had done so. A promise to pay, other than to bearer, which is not certain as to the payee, is not negotiable, with certain well-defined conventional exceptions not at all applicable here. *McIntosh v. Lytle,* 26 Minn. 336, 3 N. W. 983; *Alexander v. Thompson,* 42 Minn. 498, 44 N. W. 534; *Brown v. Gilman,* 13 Mass. 158. No evidence of any different rule in Illinois was introduced, hence presumption of identity arises. *Slaughter v. Bernards,* 88 Wis. 111, 59 N. W. 576.

The next contention rests upon a perfectly well-established rule, that the delivery of a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of any one to whom it may come. *Snyder v. Van Doren,* 46 Wis. 602, 1 N. W. 285; *Johnston H. Co. v. McLean,* 57 Wis. 258, 15 N. W. 177; *Johnson v. Weed & G. Mfg. Co.* 103 Wis. 291, 295, 79 N. W. 236; *Angle v. Northwestern M. L. Ins. Co.* 92 U. S. 330; *Dinsmore v. Duncan,* 57 N. Y. 573. This rule is based on implied agreement with any one who may become the owner, and is not to be confused in principle or application with those cases, some of which are cited above, where an incomplete instrument is delivered to one, not as payee, but as agent, with authority to make it complete, and where the agent exceeds his authority; for the insertion of plaintiff's name in this paper was not made by defendant's agent, but by plaintiff himself, under his claimed rights as owner. This implied authority depends, however, on the very existence of

a blank. There is no right in the holder of a contract, negotiable or otherwise, to rewrite it or insert omitted provisions, except where the signer, by leaving a blank, obviously delivers it with such intention. In the instrument before us there was no blank; the writing joined to the printed portion without physical break or separation. True, there was an hiatus in sense, but that does not carry with it any authority to supply the missing term.

We must therefore reach the conclusion that this instrument is not negotiable. Whether it is absolutely void as a contract, either originally, because containing no promise to pay to any one, or subsequently, because of illegal alteration by plaintiff, for both which contentions there is authority, we need not decide. Being nonnegotiable, the plaintiff could gain none of those technical protections or advantages which run with that class of contracts. He can, at most, rely on equitable doctrines of estoppel, if he was misled to his hurt by defendant's act. Defendant, of course, had a perfect right to make his own contract. He had the right to say he would be liable to the Bloomington bank for money to be loaned to his son, personally, and to refuse to become liable for preexisting debts of the corporation of which his son was president. He did agree to the former, and not to the latter, to which, however, the judgment subjects him, obviously to his injury, for the corporation is bankrupt and out of existence, and he can have no hope of reimbursement from it. His defense, therefore, to the liability asserted is not technical, but meritorious and equitable. It is that he never agreed to assume it.

Notwithstanding all this, however, he might still be equitably estopped to deny liability if plaintiff had been induced to change his position in reliance upon acts of defendant which the latter intended to have such effect, or ought reasonably to have anticipated would do so. *Gove v. White,* 20 Wis.

425, 437; *Anderson v. Coburn,* 27 Wis. 558, 566; *Kingman v. Graham,* 51 Wis. 232; *Simonsen v. Stachlewicz,* 82 Wis. 338, 52 N. W. 310; *Brothers v. Bank of Kaukauna,* 84 Wis. 381, 397, 54 N. W. 786; *Mygatt v. Tarbell,* 85 Wis. 457, 467, 55 N. W. 1031; *Loizeaux v. Fremder, ante,* p. 193, 101 N. W. 423. The plaintiff does not claim that there was any express representation to him by L. G. Willing that defendant had given any authority to use the note as collateral to the corporation's debts; hence, if misled at all, such misleading must have been by the instrument itself. He testifies, however, that at the time of taking the note he did not observe the absence of any payee's name; hence, so far as he knew, it might have been payable expressly to some third person; so that on no theory could he reasonably expect to get any title to it without such payee's indorsement. Such negligence would seem to preclude him from any right to invoke estoppel; it is not reliance upon any act of defendant. *Pier v. Bullis,* 48 Wis. 429, 434, 4 N. W. 381; *Kingman v. Graham, supra; Trenton B. Co. v. Duncan,* 86 N. Y. 221. Independently of this, however, we cannot discover anything in the note itself to justify him in supposing it was intended for him. As already stated, it showed on its face an intent by defendant to become bound to some person or that person's order. He did not assume that L. G. Willing was the person, for he did not require him to indorse. If he assumed that from the omission to name a payee there resulted a right in any holder to insert his own name, then he made a mistake of law; but surely defendant cannot be charged with duty to anticipate such a mistake. He had the right to expect that any one dealing with the paper would act in recognition of established rules of law. *Loizeaux v. Fremder, supra.* If, however, plaintiff had inferred, as he must if he read the paper, that there was a mere omission, that some one was intended to be named as payee, and that to complete the instrument that person's name must be added, he certainly was put

upon inquiry to ascertain that person. There was nothing to warrant him in believing that he, of all the world, was the one.

The legal principles above announced, applied to the undisputed facts that the only contract made by defendant and attempted to be expressed by the so-called "note" was merely to be liable to the Bloomington bank, or its order, and only for money to be loaned L. G. Willing personally, result in the conclusion that defendant never became liable at all to the plaintiff, and therefore is entitled to judgment denying plaintiff any recovery, and enjoining any further attempted enforcement of the judgment entered in Illinois upon cognovit.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayer of the answer and counterclaim.

CASSODAY, C. J. (*dissenting*). The defendant's signature to the written instrument in question is undisputed. At the time of signing that instrument, the defendant received from his son his note for the same amount—$2,500. The son resided at Bloomington, Illinois. He was president of the corporation mentioned in the opinion of the court, and testified that his father gave him the paper to see if he could get money on it from the People's Bank of Bloomington, and, among other things, said:

"I had no arrangement at all with my father concerning getting money on this paper, only I gave him another note in place of it. I was intending to use the money I was to get at the bank to buy the shares of my former partner."

The defendant testified to nothing to the contrary. The instrument in question, therefore, was based upon a good consideration, being a note of equal amount. It was given for the very purpose of raising money to aid the son in the business of the corporation—buying out his partner's stock. The

attorney who appeared in the case in behalf of the defendant was expressly authorized to appear for him and confess judgment without process. Certainly the Illinois court had jurisdiction over the defendant and the subject-matter in entering judgment against the defendant. That judgment is entitled to full faith and credit, and to the same validity and effect in this state that it had in Illinois. Sec. 1, art. IV, Const. U. S.; *Mills v. Duryee,* 7 Cranch, 481; *Hampton v. McConnel,* 3 Wheat. 234; *Sanborn v. Perry,* 86 Wis. 361, 366, 56 N. W. 337, and cases there cited; *Frame v. Thormann,* 102 Wis. 653, 669, 79 N. W. 39; *S. C.* 176 U. S. 350, 20 Sup. Ct. 446. Such full faith and credit, in my judgment, precludes a collateral attack, in the court of another state, based upon mere irregularities and errors not going to the jurisdiction of the court rendering the judgment, nor to the consideration upon which the judgment is based. The power of a court to set aside its own judgments for irregularities or errors, within a limited time, may be conceded, but the power of other courts—not appellate—is limited to matters of jurisdiction and substantial rights. Whether the instrument was used to raise money from the People's Bank of Bloomington, or otherwise used by the son to help out the corporation of which he was the president, or to buy out his partner, was of no material consequence to the defendant; and the son is not here complaining. The liability of the defendant does not depend upon the negotiability of the instrument, but upon whether there was a good and valid consideration for his promise to pay. Equity regards substance, not form. The defendant executed and delivered the instrument in consideration of his son's note for the same amount, and without any fraud being practiced upon him. To my mind, there is a failure to present any meritorious defense such as could be established in a court of Illinois, outside of the one in which the judgment was rendered. *Atkinson v. Foster,* 134 Ill. 472, 25 N. E. 528; *Hempstead v. Humphrey,* 38 Ill.

90; *Hansen v. Schlesinger,* 125 Ill. 230, 17 N. E. 718; *Burch v. West,* 134 Ill. 258, 25 N. E. 658; *Farwell v. Huston,* 151 Ill. 239, 37 N. E. 864; *Blake v. State Bank,* 178 Ill. 182, 52 N. E. 957.

MARSHALL, J. (*dissenting*). I cannot concur in the decision in this case. It seems that my brethren have overlooked two important matters, either of which properly applied would have led to a different result. I will state them briefly.

In Illinois where the judgment sought to be enforced was entered the doctrine does not prevail that there must be a certain payee mentioned in a paper as an essential to its being a promissory note, or that there must be a blank in such paper suggesting authority to the holder to fill up the same by writing in the name of a payee, and that the filling up of the blank is a condition precedent to the instruments being treated as a promissory note. A writing worded thus: "Good for 50 cents. H. C. Meyers, Sut."—in *Weston v. Myers,* 33 Ill. 424, was held to be a good promissory note, enforcible by the holder without the addition of any words thereto, although the holder might, if he saw fit, have written after the words "cents" *payable to the order of myself.* The doctrine that a note complete in form, except as to the name of the payee, a blank being left therein therefor, suggesting authority to the holder to properly fill the same, was, in effect, said to be applicable to any paper indicating clearly intention by the maker to execute a negotiable promissory note. That is recognized by text-writers to be somewhat out of harmony with the general rule. Randolph on Commercial Paper, § 167 (2d ed.). However, it being the law of Illinois it seems that the instrument in question would be regarded there as a good negotiable promissory note in the hands of any holder for value, and that the familiar doctrine referred to by my brethren permitting the impeachment upon equitable grounds of a judgment entered by confession upon

an attempt being made to enforce the same does not apply. It could not be successfully invoked in the courts of Illinois, and it is conceded that such being the case it cannot properly be so invoked here.

My brethren considered the rights of the parties only from the standpoint of the ordinary relations existing between the maker and a *bona fide* holder by indorsement of a negotiable promissory note, as if the holder of such a note, or a mere assignee for value of a contract to pay money, could not under any circumstances be safe from defenses possessed by the payor against the original payee. No time need be spent, it seems, demonstrating that upon principle and authority such holder may by the law of estoppel *in pais,* in some circumstances, be safe against such defenses. *Wiggin v. Damrell,* 4 N. H. 69; *Bradford v. Williams,* 91 N. C. 7. If a person puts another in possession of a chose in action under such circumstances as to suggest to others that it is free from any defense in such person's behalf, he cannot change that apparent situation to the prejudice of a third party dealing therewith in the exercise of ordinary care. That is the effect of the cases cited. The principle requires no discussion to demonstrate its correctness. It applies to this case in my judgment. In any view that can be taken thereof, appellant, in effect, held out his son to be the owner of a defective promissory note and the possessor of an equitable right to its reformation and of authority to transfer the defective instrument with such incidental right. Therefore as to one who parted with value relying upon such appearances, he is estopped from changing his apparent position to that one's prejudice. Appellant's secret agreement with his son as to the use to be made of the note cannot properly be regarded as the foundation of an equity superior to that possessed by the purchaser from the son who acted with due care and in good faith, relying upon appearances for which appellant was responsible.

BATAVIAN BANK, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

November 21—December 13, 1904.

Assignment of accounts: Rights of offset: Agency: Apparent authority of agent: Evidence.

1. Plaintiff's assignor was in the habit of making a written assignment of its monthly account against defendant for castings to the plaintiff bank, and sending the bill so assigned to the purchasing agent of defendant, who returned the same with a signed statement acknowledging the receipt of such account against defendant, stating amount, date and the fact of its assignment. The writing further stated: "The net amount thereof, after deducting cost of transportation and other reasonable charges, to be paid to said bank when adjusted and due." At the same time plaintiff's assignor was purchasing from defendant scrap brass, and, at the time said assignor made a voluntary assignment, defendant's accounts for scrap brass amounted to one-half of the bills for castings. In an action on such assigned accounts defendant sought to set off the value of the scrap brass against such accounts, and offered to allow judgment to be taken for the balance. *Held*, that the promise to pay the net amount of such accounts "after deducting cost of transportation and other reasonable charges," excluded other deductions.
2. In such case, the words "other reasonable charges" do not refer to a setoff for the scrap brass sold.
3. In such case, the evidence of a long-continued course of business dealing in regard to such accounts by the purchasing agent of defendant, is *held* sufficient to create an apparent authority in the purchasing agent to make such agreement, on which plaintiff had a right to rely, notwithstanding the by-laws of the defendant conferred no such power.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover on nine separate accounts for merchandise sold by the John James Company, a manufacturing corporation of La Crosse, to the defendant between March, 1902, and January, 1903, which accounts were sev-

erally assigned to the plaintiff with the knowledge and written consent of the defendant; said accounts amounting in the aggregate to $5,529.53. The defendant admits the sale of the goods, but seeks to set-off against the accounts certain sums due it for scrap brass sold by it to the John James Company, amounting in all to $1,871.67, with interest, and offers to allow judgment to be taken for the balance. The action was tried by the court, and the facts were not seriously in dispute. The evidence showed that the John James Company, at the time the accounts accrued, was operating a foundry at La Crosse, and had been in that business for many years prior; that since 1890 the John James Company had been manufacturing and selling to the defendant brass castings and other articles, rendering monthly bills therefor, which bills were delayed in payment for several months; that, in order to obtain credit at the plaintiff's bank, the John James Company from about the year 1890 was in the habit of making a written assignment of each monthly bill to the bank, and sending the bill so assigned to the purchasing agent of the railroad company, with a written instrument attached, in the following form (blanks being properly filled):

"Please Sign and Return.

"Received ..... (date) ..... of John James Company their invoice and account against the Minn. St. Paul & Sault Ste. Marie R. R. Company, for ..... Dollars, dated ..... and assigned to Batavian Bank of La Crosse, Wis. The net amount thereof, after deducting cost of transportation and other reasonable charges, to be paid to said bank when adjusted and due.

"..... .

"(Signature of Purchasing Agent);"

—that the purchasing agent in each case signed and returned the said instrument, with the invoice, to the John James Company, and that said company regularly took the same to the plaintiff bank, gave its note to the bank for the amount of the invoice, and received credit therefor, and de-

livered the invoice, with the accompanying instrument, to the bank, as collateral for such loan; that the defendant company in due time sent a draft to the John James Company for the amount of each invoice, payable to the order of the bank, which draft the James Company delivered to the bank in payment of the loan, and thereupon received back the note which it had given therefor; that this course of dealing took place regularly nearly every month until the failure of the John James Company, in February, 1903; that the John James Company during all this time purchased scrap brass of the railroad company, their bills for such scrap brass amounting to about one half of the bills for castings, and that the James Company generally paid for such scrap brass by drafts purchased of the bank when the railroad company sent a draft in payment for an invoice of castings; that in February, 1902, the plaintiff had in its possession eight of such invoices, with accompanying assignments, amounting to over $3,000, and wrote to the defendant, asking when they might expect to be paid therefor, and whether there was any claim or set-off against them, and defendant's auditor replied, recognizing the correctness of invoices amounting to $2,539.53, and charging up against them three bills for scrap, and inclosing a draft for a balance of $494.50; that the bank refused to receive said draft, and returned the same to the John James Company, and that John James, president of the company, thereafter saw some of the officers of the defendant with regard to the matter, and some time afterwards the defendant paid the assigned accounts to the bank in regular course as before; that when the John James Company made an assignment for the benefit of its creditors in February, 1903, the bank owned the invoices and assignments in question, with accompanying written instruments attached, and had acquired the same in the usual course of business, as before stated; that it filed no claim in the assignment proceedings for the amounts represented by said invoices.

The trial court, upon these facts, concluded that the plaintiff was entitled to recover the full amount of the invoices, with interest, and that the setoffs claimed by the defendant should not be allowed, and from judgment upon these findings the defendant appeals.

Alfred H. Bright, for the appellant.

For the respondent there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.*

WINSLOW, J. We have been unable to see why the judgment rendered in this case should not be affirmed. It was entirely competent for the bank to take assignments of the invoices in question, and such assignments alone would transfer good title thereto, subject, of course, to all proper offsets which the defendant then had against the assignor. No consent on the part of the defendant was necessary to accomplish this result. But such assignments alone would be a doubtful security, especially in view of the fact that the assignor was continually buying scrap on credit from the railroad company. It would seem almost a demonstration from the wording of the agreement itself that this was the very difficulty which the written agreement executed by the purchasing agent of the railroad company was intended to meet and correct. Obviously the purpose of that agreement was to make the assigned invoice better security; otherwise it was unnecessary. The bank evidently wished a direct acknowledgment of the account, and an agreement to pay the proceeds to itself instead of to the assignor. This is just what the written agreement executed by the purchasing agent and attached to each invoice does in unmistakable words. Not only this, but the promise is to pay the net amount thereof "after deducting cost of transportation and other reasonable charges." This excludes other deductions. Certainly the words "other reasonable charges" cannot by any process of reasoning be logically held to refer to set-offs for goods sold.

When the bank received the assigned invoice, with this agreement attached, and loaned money to the James Company on the faith thereof, its right to recover thereon in the event of nonpayment of the loan rests upon the principles of the law of contracts, which are so well understood as to require no further statement.

But it is said that the purchasing agent had no authority to make these agreements, and evidence was introduced tending to show that the by-laws of the company conferred no such power upon him, and that he had received no express authority from his superior officers to execute such agreements. The testimony showed, however, that the purchasing agent was known as a general officer of the defendant; that he purchased all the material for the road on his own judgment, and that for twelve or thirteen years he both purchased the brasses and sold the scrap, and made the agreements in question monthly; that there was no secrecy in these arrangements, but that, on the contrary, the items were entered in a separate account in one of the railroad books, called a "voucher register," with the credit entry, "Batavian Bank for brasses bought of the John James Co.;" and that each monthly account was thereafter in due time paid by check or draft in favor of the bank.

A course of business dealing by an agent so public and long continued as this is surely sufficient to create an apparent authority which may be safely relied upon by one dealing with the corporation upon the faith thereof. *Ford v. Hill,* 92 Wis. 188, 66 N. W. 115.

By the Court.—Judgment affirmed.

HUTCHINS, Appellant, vs. BAUTCH and another, Respondents.

November 22—December 13, 1904.

Appeal and error: Findings, when disturbed: Conclusiveness: Mechanics' liens: Contracts: Definiteness: Continuity of work: Estoppel: Sale of land pending doing of lienable work: Offer to perform.

1. Findings of fact made by a trial court are to be deemed verities in support of the judgment rendered thereon, unless from the record it appears that they are contrary to the clear preponderance of the evidence.
2. It is not an essential under the lien remedy given to mechanics and materialmen by ch. 143, Stats. 1898, that the contract for furnishing the labor or material should be so definite as to enable the one personally liable to the lien claimants, or the owner or person interested in the structure involved, to determine precisely the contract price for such labor or material or the details of the work. It is sufficient as to work or material alleged to have been furnished under one contract to show that it was in fact so furnished.
3. While there must be some visible commencement of work under the lien statute to fix the time of the commencement of the lien claim, there need not be visible continuity of work from first to last in order that the last labor or material furnished may relate back to the commencement of work, and all be regarded as furnished under one contract or an entire running account.
4. Delay in completing lienable contract work sufficient to indicate so clearly either that the contract has been fully performed or has been abandoned, as to excuse third parties dealing with the property from making inquiries in respect to the matter, may affect the right of lien upon principles of estoppel *in pais*.
5. If, while a person is in the performance of lienable work on land under contract with the owner the latter sells the land to a third party, such person is in any event entitled to a lien thereon for the work and material already furnished whether he completes his contract or not, if failure in that regard is without fault on his part. An offer by him to perform, as regards preservation of his lien, is equivalent to performance.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action to remove a cloud on title to real estate. The issues made by the pleadings are sufficiently indicated by the findings, which are to this effect: September 18, 1900, and for some time prior thereto, plaintiff owned the land described in the complaint, on which date he contracted to sell and convey the same to Mary Bangs. The contract was duly recorded September 22, 1900. Mary Bangs took possession of the property and continued in such possession until May 1, 1903. May 20, 1902, she quitclaimed the property to plaintiff reserving possession, however, till November 1, 1902. The deed was duly recorded. November 24, 1902, plaintiff by warranty deed conveyed the land of John Arneson. The deed was duly recorded.

May 7, 1901, defendants contracted with Mary Bangs to deepen a well on the premises and repair the pump used in such well and equip the pump with a frost-proof cock. Defendants commenced performance of such contract May 4, 1901, and finished their work, except that of equipping the pump as stated, by May 20, 1901. The final act was omitted for the customary time, and was performed about May 27, 1902. On that date a petition in due form was duly filed to preserve defendants' right of lien on the premises for the amount due them under said contract, which is the cloud complained of. Upon such facts the court decided that defendants were entitled to a lien on the land in accordance with their petition, and that such petition did not constitute a cloud on plaintiff's title, which equity, at his suit, would remove.

Accordingly judgment was rendered dismissing the complaint with costs.

For the appellant there was a brief by *R. S. Cowie* and *Winter & Esch,* and oral argument by *Frank Winter.*

For the respondents there was a brief by *Anderson & Ekern,* and oral argument by *H. E. Ekern.*

MARSHALL, J. The ultimate question for solution in this case is, under the circumstances were respondents entitled to a lien under ch. 143, Stats. 1898, the person they dealt with having, more than six months after their contract was, as regards appearances to third parties, performed, conveyed her interest in the land to appellant? The errors assigned, in the main, are that the trial court improperly held that the contract included the work of putting on the frost-proof cock; that putting it on after the apparent completion of the work, as regards third parties, extended the time for filing the lien petition; that an entry on the premises to complete the work after the sale to plaintiff, without his permission, could affect the right of lien; and that the delay of one year in putting on the frost-proof cock was according to custom, or was reasonable.

On all questions of fact involved in the assignments of error the evidence, as we find it in the record, is so conflicting that under familiar rules the trial court's findings cannot properly be disturbed.

Counsel argue that the contract was so indefinite that, as a matter of law, the putting in of the frost-proof cock should not be deemed to be included therein. On that reference is made by counsel to decisions elsewhere. There is nothing in our statutes suggesting as an essential to a lien on realty, as to third parties, that the terms of the contract must be so precise that the amount agreed to be paid for work and material furnished thereunder can be definitely determined therefrom. The rule in Massachusetts, which counsel invoke, does not apply to our statutes. They in unequivocal terms provide that every person, who as principal contractor furnishes work or material in specified cases, including such as the one before us, used in the improvement of realty so as to become a part thereof, is entitled to a lien for the indebtedness created thereby upon all the right, title and interest in such realty of the person contracted with at the time of the com-

mencement of such work, or the furnishing of such material. Neither the contract price for the work and material, nor the precise details of such work are required by the statutes, expressly or by implication, to be fixed in advance. It is sufficient as to any work or material that it be in fact included in the contract. The time for filing the lien petition is limited to six months subsequent to the last charge for furnishing material or work. Sec. 3318, Stats. 1898. That, as to all furnished under one contract, regardless of the time occupied in the execution thereof, commences at the date of the last thereof. *Fowler v. Bailley,* 14 Wis. 125. That case indicates clearly that mere lapse of time between the last act and those preceding it in the execution of a contract is immaterial.

In support of the point that omission to furnish some unimportant part of contract work, or material, till a considerable period after the contract has been apparently fully performed cannot extend the time for filing the lien petition. *Chapman v. Wadleigh,* 33 Wis. 267, is referred to. That case is to the effect that the language of sec. 3314, Stats. 1898, providing that the lien shall have priority over any other lien originating subsequent to the commencement of the construction, repair, etc., calls for visible physical acts in that regard, likely to give notice to third parties dealing in respect to the realty and put them on inquiry. It has no reference to necessity for visible continuity of work from the commencement thereof to the beginning of the period limited for filing the lien. *Fish Creek B. & L. D. Co. v. First Nat. Bank,* 80 Wis. 630, 50 N. W. 585, cited by counsel, relates to the log-lien statute, which expressly requires continuity of work. *Berry v. Turner,* 45 Wis. 105, also cited, is to the effect that work done after completion of a contract, pursuant to a settlement for breach thereof does not count in determining the time within which the lien may be filed for indebtedness accruing under the contract. Numer-

ous other cases are cited to our attention all of which have been examined. We fail to discover that any of them more closely bear on the question in hand than those specially referred to. Doubtless, such delay in completing a contract as to indicate either full performance, or abandonment of the work, so clearly as to render failure to make inquiries in respect to the matter excusable, would be binding on the lien claimant upon principles of estoppel *in pais*. The trial court found here that there was no unreasonable delay, and we do not see our way clear to disturb that decision.

It seems that counsel are in error in their position that the trial court decided that a lien can be acquired, or the time for filing a lien petition extended, by the commission of a trespass. When the last act under the contract was performed the person respondents contracted with was still in possession of the premises, and so far as we can discover, neither she nor any one else prohibited them from completing their work. The trial court, doubtless, found that there was no such prohibition, and that if it were otherwise, their willingness to complete their work was sufficient to save their right of lien for work already done. It may be that if one sell land while lienable work is in progress thereon under a contract, the license incident to the contract to enter upon the premises might be terminated by the new owner, but he could not by any mere act of his defeat the lien remedy of the contractor for work already done. If he refused to allow completion of the contract an offer to do so would be equivalent to performance, as regards the commencement of the time limited by law for filing the lien petition for work and material already furnished. Otherwise the remedy under the lien statute might in many cases be defeated by sale of the realty pending the execution of a contract to do lienable work thereon.

There are no other questions suggested for consideration deemed to be of sufficient importance to call for special treatment.

By the Court.—The judgment is affirmed.

HORN, by guardian *ad litem,* Appellant, vs. LA CROSSE BOX COMPANY and another, Respondents.

November 22—December 13, 1904.

Master and servant: Personal injuries: Negligence: Assumption of risk: Contributory negligence: Direction of verdict: Vice-principal.

1. In an action for personal injuries received by a fifteen-year-old boy from the rapidly revolving knives of a planing machine, under the facts stated in the opinion, *held:*

   (1) The plaintiff's evidence, that he was ignorant of the danger, was not wholly incredible.

   (2) A reasonable mind could absolve him from negligence in attempting to do that which he had seen others do in safety.

   (3) It was error to direct a verdict for defendant.

2. In such case, it appeared, among other things, that plaintiff, who had been employed in defendant's factory about three weeks, and with no previous experience of any sort with machinery, while assisting defendant's superintendent to operate a planing machine, was directed by the superintendent to move a device whereby the power was disconnected from the machine, and to empty a hopper underneath rapidly revolving knives. These knives were so hung that they would, by momentum, continue their revolutions for some time after the power was disconnected, and were obscured from ordinary view. Plaintiff immediately went to the hopper and attempted to empty it, when he was injured. *Held,* sufficient proof of negligence, since the superintendent had no reason to suppose that plaintiff, with his youth and inexperience, had any knowledge of the occult and hidden devices and conditions which made an immediate attempt to empty the hopper dangerous, an act which he had imperatively commanded plaintiff to do.

3. Whether an act is that of a fellow-servant or a vice-principal, depends not on the grade or the position of the person doing it, but on the character of the act.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Plaintiff, a fifteen-year-old boy, had been employed for about three weeks in the corporate defendant's box factory,

defendant *Joosten* being its secretary and general manager. He had no previous experience of any sort with machinery, and his duties in the factory had been various, such as carrying lumber, sweeping up, and, more particularly, receiving lumber from saws and planers and distributing it to places of further treatment. The machine at which he was injured was a planer, the machine proper consisting of a framework supporting a table about three feet from the ground, twenty-two inches long east and west, at each end of which were upper and lower feed rollers to propel the boards throught it. In the twenty-two-inch space between these rollers were two cylinders, one above and the other below the surface of the table, to which were bolted knife edges, and which, revolving with great rapidity, served to plane the boards as they passed through. The operator of the machine stood at the west end and inserted the boards, while the plaintiff at times was required to stand at the end of a table some seven feet long, eastward of this planer, to receive, sort, and carry away the planed boards as they came through. Motion was communicated to the machine by means of a large belt passing from the main shaft overhead to counter-shaft on the floor. It was ineffective when loose, but was rendered effective by lowering against it a large weighted pulley near to and on the south side of the seven-foot table above mentioned, and power was removed from the machine by lifting this pulley off of the belt. The effect of the removing of this power was to stop the movement of the feed rollers, and therefore of the boards; but the two knife cylinders, being hung so as to revolve with the least possible friction, would, by momentum, continue their revolution for some time—sometimes a half a minute after the belt was relaxed. Immediately below the planer was a metal hopper, terminating at the floor in a six-inch pipe which was expected to catch the chips which fell downward and conduct them through the floor by the aid of an air blast; a similar hopper sat above the planer covering completely the

knives. The lower hopper, at intervals, from three to six times per day, would become clogged and filled up with sawdust, whereupon it became necessary for the operator to get under the machine, lift the hopper away from the orifice in the floor, and empty the sawdust out; before doing which, the pulley was lifted off of the main belt, and power withdrawn from the machine. Plaintiff had never emptied this hopper, but he was expected, after the first two or three days, to lift the pressure pulley off the belt. He testifies that he had no knowledge of the interior mechanism of the planing machine, nor by what means the smoothing of the boards was accomplished; that only the feed rollers were in sight, or obvious, and obscured the vision of the knives within; also, that he was entirely ignorant of the fact that such knives revolved at all, and of the fact that they, unlike the feed rollers, which he could see, did not stop immediately upon relaxing the main belt. There was also evidence that the noise prevalent in the factory from some twenty other machines was such that the continuing revolution of the knife cylinders might well escape notice. On the 30th of July, 1903, the defendant *Joosten,* who was in command of the whole shop, was temporarily feeding boards into this planer, when the lower hopper became choked up, whereupon he gave plaintiff the signal to relieve the tension of the belt by lifting the pulley, which plaintiff did. He thereupon directed plaintiff, by signal, to empty the hopper. Plaintiff, accordingly, lifted up the seven-foot table standing between him and the planing machine, got down in the space under the planer, and, steadying himself with one hand, attempted to take hold of the upper edge of the hopper for this purpose, and thereby his hand came in contact with the revolving knives, and was so lacerated as to require amputation. The edge of the hopper was only an inch and a half from the knife as it revolved. No warning or explanation had ever been given the plaintiff of the peril of contact with this knife in taking out and emptying the hopper,

nor of the fact that the knives would continue to revolve for a time after the rest of the machinery stopped. The plaintiff alleges various phases of negligence in the way of defects in the machine, etc., but, among others, the direction to plaintiff from the defendant *Joosten* to perform the dangerous work of removing this hopper without warning. At the close of the evidence the court held that the plaintiff must, by the exercise of ordinary reason over what was obvious, have realized the existence and movement of the knife cylinders, and the peril of attempting to remove the hopper before they had stopped, and therefore was precluded from recovery by his contributory negligence, or voluntary assumption of the risk from that peril, and accordingly directed a verdict in favor of the defendants, from judgment upon which the plaintiff appeals.

For the appellant there was a brief by *Higbee & Bunge,* of counsel, and oral argument by *E. C. Higbee.*

George H. Gordon, for the respondents.

DODGE, J. Doubtless if plaintiff, though only a fifteen-year-old boy, knew that there was a rapidly revolving knife in such close proximity to the edge of the lower hopper that his hand was likely to come into contact therewith in attempting to grasp that edge, he must be held to have appreciated the danger, and to have assumed that risk in attempting to do the work, although by express direction of his employer. The court below, in an opinion filed upon a motion to direct a verdict, evidently reached the conclusion that the plaintiff must have known such facts, notwithstanding his positive denials. The only undisputed proof of what plaintiff knew is that, within the twenty-two inch space between the forward feed rollers and the back, were certain knives, and that by means thereof boards pushed in at one end came out at the other smoothed on their surfaces. He testifies he had never seen the knives in place; he only knew of their existence from hav-

ing seen them leaning against the machine before being put in place; and this evidence is not unreasonable, for his duties toward the machine ceased when boards ceased to come through it. Now, from these facts alone, might not a fifteen-year-old boy, with no knowledge or experience of machinery or mechanical processes, be ignorant of the fact that these knives revolved? Is it not reasonably probable that such a person may have conceived that they accomplished the smoothing of the boards substantially by a reversal of the same process, as does the carpenter's plane, pushed over them? The writer confesses to have had that impression himself as to machine planing until he had an opportunity to examine one of such devices. However absurd it may seem to one who is familiar with the processes and apparatus for manipulating lumber, we are unable to say that it is inconceivable that one not so familiar might never gain a conception of a rapidly revolving and dangerous knife cylinder from the mere fact that knife blades smoothed boards which came through. But even if plaintiff must have gained that conception, as the court below seems to think and as counsel for respondents argue, there are still respects in which it is not beyond the realm of reasonable probability that he may have failed to know of those physical facts from which arose the peril. There is not the slightest evidence that he knew anything of the size of the cylinders, so that he might infer that one of them extended so far below the table as to be near the edge of the hopper that he was required to remove, which was at least four inches below the under surface of the planed boards. Neither is there the slightest evidence that he had any knowledge whether the cylinder which revolved below the surface of the table was near the front end or near the rear end of the machine. If near the front end, it would have been in no dangerous proximity to the place where he put his hands. But, further than this, is the positive testimony of the plaintiff that he had no knowledge that, when the machine stopped by his withdraw-

ing the pressure from the main belt, the knives did not also stop; and there is nothing in the evidence to indicate that this fact was in any wise obvious, or even apparent. Clearly, if the knives were stationary, he incurred no peril in performing the duty imposed upon him. He had seen others, without injury, remove this hopper several times daily, but under circumstances of obscurement and diversion of his attention, such as to prevent any very close observation of how they went about it. He received direction from his superior to do the work, and he had a right to suppose that he would not be assigned to a service involving imminent peril without some warning of the latter fact. In weighing all these circumstances, it must also be remembered that plaintiff was a boy, and not a mature man; that his care or negligence is to be measured by the conduct of the great mass of mankind, under similar circumstances; and that his immaturity is an important one of those circumstances. The jury might well consider, consistent with due care in him, a measure of inadvertence or want of reflection which would be repugnant to such conclusion in case of an adult. From all these considerations, we are convinced that the court below could not properly hold that the plaintiff's evidence that he was ignorant of the danger was wholly incredible, nor that no reasonable mind could absolve him from negligence in attempting to do that which he had so often seen done by others safely.

The trial court seems also to have been of the opinion that negligence on the part of the defendant was not proved, on the ground that *Joosten,* the superintendent, had no reason to suppose that plaintiff would immediately go to this hopper and attempt to remove it without giving time for the knives to stop their revolution. This ignores two considerations: First, that Mr. *Joosten* had no reason to suppose that the plaintiff, with his known youth and inexperience, had any knowledge of the occult and hidden devices and conditions which made an immediate attempt to remove the hopper dan-

gerous; but also it ignores the testimony—disputed, it is true, but still proper to be considered by the jury—that he imperatively commanded plaintiff to do the very thing which he did.

These views are conclusive against the contention of the respondent *Joosten,* who, having authority over him, expressly directed plaintiff to empty this hopper. It is, however, claimed that the defendant box company is not thereby rendered liable, because *Joosten* was a co-employee with the plaintiff. The law governing this question is well settled by the cases respondents cite: *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 448, 90 N. W. 429; *Baumann v. C. Reiss Coal Co.* 118 Wis. 330, 95 N. W. 139. Whether an act is that of a fellow-servant or a vice-principal, depends not on the grade or position of the person doing it, but on the character of the act. That *Joosten* was general manager is by no means conclusive. Doubtless when he undertook to feed the planer, he acted as a fellow-servant, but when he acted in his capacity as manager in assigning employees to their respective duties he was vice-principal. Now, it appears that it was not a function of the feeder of the planer to give directions to plaintiff or any one else to empty this hopper. *Joosten* himself, while denying that he instructed plaintiff to do this work, says he went to direct one Miller, a regular machine operator, to do it, thus indicating that he was exercising his power of command. We cannot agree with counsel that the jury might not have found that, in assigning plaintiff to this dangerous duty, his act was in the capacity of vice-principal.

We conclude that the case should have gone to the jury, and that error was committed in directing a verdict.

By the Court.—Judgment reversed, and cause remanded for a new trial.

CASES DETERMINED

AT THE

January Term, 1905.

ENGI, Respondent, vs. HARDELL and others, Appellants.

September 27, 1904—January 10, 1905.

Logs and timber: Liens: Application of payments: Non-lienable demand: Receipt in full: Release of right to lien: "Slabs."

1. In an action to foreclose a lien on lumber it appeared, among other things, that the manufacture of the lumber on which the lien was claimed was prosecuted continuously, with slight interruptions at irregular intervals for such repairs of machinery as are usually incident to such business. *Held*, under the circumstances, that the services rendered in the repairing were a mere incident to the work of manufacturing the lumber for which the plaintiff was entitled to a lien, and protected by the statute.
2. In an action to foreclose a lien on lumber it appeared, among other things, that the amount of plaintiff's board bill, paid by his employer, should be offset against his earnings. *Held*, that it was proper to apply the amount of such board bill on that part of plaintiff's demand for which he had no lien.
3. Certain laborers, assignors of plaintiff, otherwise entitled to liens on lumber, acknowledged, by written receipts, that the payment therein recited was in full for all labor performed by them on the logs from which certain of that lumber was manufactured, but the receipts did not expressly show that the laborers agreed to release their claims for a lien upon the lumber manufactured during the period of their service. *Held*, that the trial court did not err in holding that the amounts covered by such receipts were received for services, and that they were no release of the laborers' right to a lien on the lumber.
4. Under secs. 3329–3342*b*, Stats. 1898, giving a lien on logs, timber, etc., "slabs" are not included in the material designated as "lumber and timber," and therefore not subject to a lien.

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action to recover the amount due for services rendered by the plaintiff and his assignors for the defendants E. W. Burr, Theodore Kloss, and Fred Kloss, who were doing business as the Pelican Manufacturing Company in sawing and manufacturing lumber out of logs at the town of Pelican, Oneida county. It appears that the Pelican Manufacturing Company received logs from the defendants *W. C. Hardell, Henry Heyn, Seth Kimball, John Lyons, Frank Koch, Moses Reno,* and *C. Conro & Co.,* and that these logs were sawed and manufactured into lumber between the 7th day of May, 1903, and the 19th day of June, 1903, within which period all of the services were performed for which recovery is sought, except the services in preparing and repairing the mill, which covered several days prior to May 7th. It is admitted that two of the employees—Fred Hack and Earl Lago—who kept the mill boarding house, were to board the mill employees at the rate of $3.50 per week; the Pelican Manufacturing Company to furnish the boarding house, wood and water. It was arranged that the company was to retain sufficient money out of each employee's earnings to pay Hack and Lago the amount of their board bill. The court found that at the commencement of this action there was due plaintiff for his personal services from the Pelican Manufacturing Company the sum of $11.46, and that there was due on claims for services rendered to the company before June 19, 1900, which claims the plaintiff acquired by purchase and assignment of claims for liens before this action was commenced, the following amounts: Richard Lundberg, $5.47; Robert Winquist, $34.57; Henry Winquist, $20.11; Peter Koestler, $9.57; George Koestler, $10.42; Gust. Serquist, $72.90; James Fricart, $5; Frank Meyer, $26.21; Fred Hack, $56; Earl Lago, $50.87. Each of the

employees duly filed claims for liens on or before the 8th of July, 1903, on the lumber sawed and manufactured for the defendants, as above stated, excepting James Fricart, Fred Hack, and Richard Lundberg, whose claims were assigned to plaintiff, and were included in his claim for a lien. On May 1st the Pelican Manufacturing Company had made a chattel mortgage of their sawmill property to the *Rhinelander Iron Company* and the Lewis Hardware Company. It is without dispute that B. R. Lewis acted as the trustee for the Pelican Manufacturing Company, the Lewis Hardware Company, the *Rhinelander Iron Company,* and one Emmerling, a former owner, whose interest the Pelican Manufacturing Company had purchased under an arrangement between it and these parties. He was to receive the money due the company for sawing and manufacturing lumber, and disburse it for them. He received money so due, and paid a portion of the amounts due the laborers for services rendered in manufacturing the lumber for defendants. All sums so received were applied in payment of services, except $9.40, which was paid out by him as expense of the trusteeship. He received nothing of the amounts due the Pelican Manufacturing Company for sawing and manufacturing the lumber of some of the defendants. *C. Conro & Co.* paid the amount of its sawing and manufacturing bill directly to the laborers on time checks issued to them by the Pelican Manufacturing Company for work performed at the mill. When payment was made of these time checks by *C. Conro & Co.,* the claimants signed an indorsement to the effect that the amount paid was received of *C. Conro & Co.* in full of all labor performed on logs marked "Conro." The evidence of the laborers is that they did not understand that they were receiving payment in full for all services, nor was it understood or intended to release any claim for a lien on the material so manufactured; that they could not read the indorsements; and that they were told that it was a receipt for the amount paid them for their services.

The court found that the total amount due for services to plaintiff and his assignors was the sum of $302.76, and that $284.26 of this amount was for services rendered by the claimants in the manufacture of the lumber described in the complaint, and awarded judgment against the members of the Pelican Manufacturing Company for the whole amount due, and for a laborers' lien for $284.26 on the lumber described in the complaint. This is an appeal from that part of the judgment awarding a lien for the amount of $284.26, with interest and costs, upon the lumber described in the complaint and owned by the defendants.

For the appellants there was a brief by *John Barnes, S. S. Miller,* and *A. W. Shelton,* and oral argument by *Mr. Barnes* and *Mr. Shelton.*

For the respondent there was a brief by *Van Hecke & Smart,* and oral argument by *John Van Hecke.*

The following opinion was filed October 18, 1904:

SIEBECKER, J. It is claimed that the circuit court erred in finding that there is due plaintiff the sum of $11.46 for his services rendered in manufacturing lumber for defendants at the sawmill of the Pelican Manufacturing Company. This is maintained upon the ground that the laborers were paid in full for services after May 15th, and that the services prior to this date were mainly devoted to the repair of the mill property preparatory to manufacturing the lumber. An examination of the evidence discloses, however, that the manufacturing of the lumber began on the 7th of May, and was prosecuted continuously to June 19, 1903, with slight interruptions at irregular intervals for such repairs of machinery as are usually incident to such a business. Under the circumstances the services rendered in repairing the mill are a mere incident to the work of manufacturing the lumber, for which a lien is given, and are protected under the liberal interpretation of the statute. *Carpenter v. McCord L. Co.* 107 Wis. 611, 83 N. W. 764.

Under the evidence no more than two days' services, which were rendered prior to the period for which he had a lien on the lumber manufactured for defendants, could have been included in this finding. If this amount ($3.50) is deducted from the sum found due, it would still leave a balance due him under his claim for a lien. But this deduction should not be made, because he was entitled to have this item for service applied in part payment of his board bill due the Pelican Manufacturing Company, as employers, which was to be offset against his earnings. Plaintiff does not controvert defendants' claim that the amount due for boarding the men was to be deducted from their earnings. Under such circumstances the court properly applied whatever amounts were due them for which the laborers had no lien in payment of their board bills.

It is further contended that neither plaintiff nor those who assigned their own claims to him had any lien on the lumber manufactured for the defendants *C. Conro & Co., Heyn,* and *Hardell* for the reason that the amounts due the Pelican Manufacturing Company for manufacturing this lumber had been paid by the defendants and received by the laborers for work done on this lumber. It appears that the laborers were paid these sums as claimed, and they acknowledged, by written receipts, that such payment was in full for all labor performed by them on the logs of each of these defendants, respectively, or in full payment for labor on lumber and lath at the mill. Such receipts constitute evidence of payment in full by defendants, respectively, of the amount due the laborers for manufacturing these logs into lumber, and that they received it for services rendered on the material of these defendants; but the receipts do not expressly show that the laborers receiving this money agreed to release their claims for a lien upon the lumber manufactured during the period of their service. Applying this conclusion to the facts and circumstances of the case, we cannot say that the trial court erred in holding that the amounts covered by the receipts were re-

ceived for services, and that they were no release of the laborers' right to a lien on the lumber. *Seeger v. Manitowoc S. B. Works,* 120 Wis. 11, 97 N. W. 485. The findings of the trial court of the amounts due on the claims of the laborers, that they were assigned to plaintiff as alleged by him, and that liens were properly filed within the period required by the statute, prior to the commencement of this action, are all supported by the record and the evidence.

The defendant *Rhinelander Iron Company* purchased "slabs" of the milling company, which were the product of the logs manufactured into lumber at the mill. The trial court held that this product of the logs is lienable under the laborer's lien statute. In support of this finding we are cited to cases which hold that the term "lumber," as used in the statute, includes "shingles" and "lath." That these products of the logs are treated as lumber in commerce and trade is a matter of common knowledge, but this does not seem to be the fact with respect to "slabs." Nothing in the case tends to show that they are used or treated as the other products manufactured out of logs, nor are they commonly treated or classed as "lumber or timber." We are led to the conclusion that "slabs" are not included in the material designated as "lumber and timber," and therefore not subject to a lien for services under the statute.

By the Court.—That part of the judgment which awards a lien on the "slabs" owned by the *Rhinelander Iron Company* is reversed; in all other respects the judgment is affirmed. The defendant *Rhinelander Iron Company* is not to be liable for nor to recover costs upon this appeal, but plaintiff is to recover his proper costs against the other defendants.

A motion for a rehearing was denied January 10, 1905.

DAVELAAR and others, Appellants, vs. CITY OF MILWAUKEE, Respondent.

October 18, 1904—January 10, 1905.

Appeal and error: Review: Sufficiency of exceptions: Municipal corporations: Negligence: Bridges and culverts: Damages: Unlawful association to control business.

1. Where the record discloses that appellants requested the court to find specifically on an issue, and that exceptions were taken to refusals so to find, as well as to the findings actually made, this is sufficient to entitle appellants to a review of that issue by the supreme court.
2. Plaintiffs' brick yard was flooded, and injury done to the yard and personal property thereon. The flood was caused by the negligence of defendant in so constructing a culvert that it was inadequate for the usual flow of water from ordinary rain falls and from melting snows. *Held*, that money expended for carting off refuse, and cleaning up, leveling and restoring the yard was a proper element of damage, although the evidence failed to specify the items of expense, and the court elsewhere found that plaintiffs had negligently contributed to the loss of some slabs and wood.
3. In such case, it further appeared that plaintiffs had a quantity of dry clay for making pressed brick, which became saturated with water and reduced to mud, thereby destroying it for such use. *Held*, that plaintiffs were entitled to recover the expense of drying and housing such dry clay.
4. In such case, it appeared that plaintiffs submitted their business enterprise to the control and management of an association, by which the output of their yard was regulated. *Held*, that the court was justified in refusing to allow damages for the interruption of their business.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Modified and affirmed.*

Plaintiffs bring this action to recover damages alleged to have been caused by the city in failing to provide street culverts of adequate size and capacity for the flow of water across defendant's street, situated in close proximity to plaintiffs' brickyard property, and allege that such insufficient

and inadequate culverts caused the waters naturally flowing through them at times of rainfall and melting snow and ice to back up and inundate plaintiffs' brickyard, and to damage it and the personal property thereon, and to interrupt them in the conduct of their business. The defendant city denied that it caused plaintiffs the alleged damages, and claimed that any damage was due to the acts of private parties in damming up the natural course of the water, thereby flooding plaintiffs' brickyard and the property thereon. A jury was waived, and the action was tried by the court. The court found that Deer creek had a constant flow of water, with bed and banks extending along the easterly line of plaintiffs' premises, and across the northwest corner thereof, and thence across other lands, Pryor and Russell avenues, and Bay street, into Lake Michigan; that the streets were graded; that the defendant constructed culverts under and through said street grades at the points of intersection with the stream for the purpose of conducting the water of the stream under and through the embankment and street grades. In addition, the court found as follows:

"These culverts, however, as constructed by said city of *Milwaukee,* were far too small, and were inadequate and insufficient to permit a ready and reasonable escape of the water that naturally, usually, and frequently flowed in said stream during its ordinary stages of high water, and in times of ordinary rains and in ordinary times of melting snows."

"That the defendant, city of *Milwaukee,* was negligent in constructing the said culverts of very inadequate size, and, in the exercise of ordinary care, ought to have known that said culverts would be and were very inadequate, and ought to have foreseen all the damages hereinafter mentioned as a natural, probable, and proximate result of such negligence."

The court found specific amounts for certain items of damage to plaintiffs' property on account of the floods, and awarded judgment for the recovery of these amounts, but refused to allow plaintiffs' claim for the loss of 3,911 yards of

dry clay, which, according to the evidence, cost plaintiffs twenty cents per yard to put in condition for brickmaking. It also rejected an item of $600, costs incurred in restoring the brickyard property to a proper condition for conducting the business, and allowed no damges for the interruption to the business. Plaintiffs requested the court to find these damages, and, upon refusal, exceptions were taken. Judgment for the amount allowed by the court, namely $2,587, with interest and costs, was awarded against the city. Plaintiffs appeal from this judgment.

Lyman G. Wheeler, for the appellants.

For the respondent there was a brief by *Carl Runge,* city attorney, and *V. W. Seely,* of counsel, and oral argument by *Mr. Seely.*

The following opinion was filed November 15, 1904:

SIEBECKER, J. It is insisted on the part of the defendant that no available exceptions were taken by plaintiffs for review of the alleged errors of the trial court. The record, however, discloses that plaintiffs requested the court to find specifically the damages to which our attention is directed, and which were not allowed, and that exceptions were taken to such refusals, as well as to the finding of the court, in effect, disallowing these items of damages. This is sufficient to entitle them to a review of the action of the court upon these questions.

The court found, upon the evidence, that the city was negligent in constructing culverts in its streets over Deer creek, in that they were wholly inadequate for the usual flow of water in ordinary rainfalls and the flow of water caused by melting snows, and that these inadequate culverts were the cause of the flooding of plaintiffs' brickyard, and the injury to it and the personal property thereon. A number of items of damages were allowed by the court for injury to horses, to machinery, and for the destruction of brick on the prem-

ises, but nothing was allowed for money expended for carting off the clay, and cleaning up and leveling off, and for other labor in restoring the yard. It is not disputed but that this expense was incurred for this purpose, and we find nothing in the record, and our attention is not directed to any evidence on the subject, in conflict with this claim. It is claimed on behalf of the defendant that the court was warranted in its refusal to allow any of these items, because the evidence was not satisfactory upon the subject, and failed in specifying the items of such expense. True, no itemized account of such expense could be furnished by plaintiff, yet the evidence is direct and positive that this sum was expended for this purpose, and we can perceive no reasonable ground for disallowing it as a necessary expense resulting from defendant's negligence.

It is furthermore claimed that the fifteenth finding of the court shows that the plaintiffs were guilty of negligence contributing to the losses for which these damages are claimed. Upon examination of this finding, we discover that the court found that plaintiffs negligently contributed to the loss of some slabs and wood piled near the creek, in that plaintiffs should have anticipated, from knowledge of prior floods, that, if this material was so piled, it would probably be carried away and damaged. This in no way militates against the conclusion that the item of expense in restoring the yard should have been allowed to plaintiffs, and we must so hold.

Damages were claimed by plaintiffs for the destruction of 3,911 yards of dry clay for making pressed brick, which they had prepared and housed in a shed. The injury consisted in saturating it with water and reducing it to clay mud, and thereby destroying it for such use. It appears that the cost of the process of drying and housing was twenty cents per yard—a total of $782.20. The evidence also clearly establishes that this expense was a total loss. That it was incurred is undisputed. That it must, of necessity, have been caused

by the wrongful flooding of plaintiffs' brickyard, resulting from defendant's negligence in inundating it, as found by the court, is an inevitable conclusion. Under these circumstances, plaintiffs are entitled to recover this amount.

The remaining question pressed for consideration pertains to the allowance of damages for the interruption of plaintiffs' business as brickmakers. The damages claimed for this item are not for future injury to business, and this claim is therefore free from many of the uncertainties usually incident to an attempt to show prospective losses of profits to a business. The evidence shows with reasonable certainty what plaintiffs' usual business output was during periods like those during which it was wholly interrupted by these floods; the cost of manufacture and sale of the brick which could have been made, had the business been carried on during the interrupted period; that there was a market and demand for such brick as were being manufactured by them; that they sold brick during the season, and that there were calls for brick by persons desiring to purchase, in excess of what they could have supplied, had their yard been run to its full capacity during these periods of interruption; and that such sale at established prices would have yielded a certain profit. Had these facts been supplemented by proof showing to a reasonable certainty that plaintiffs would have prosecuted their brickmaking during the period of interruption, it would furnish a sufficient and reliable basis for assessing damages for the loss to their business, but this certainty does not exist. One of the plaintiffs testified that his firm, with the other brick manufacturers of the city of Milwaukee, had formed a business association, of which they were members from 1890 until the time this action was tried. This association controlled the output of brick from their yard in 1890, and limited the output to much less than their capacity, and they were paid for so limiting their manufacture of brick out of the funds of the association. If plaintiffs maintained owner-

ship in an unlawful association—which is a question not before us, and unnecessary to decide—no damages for loss of business could be allowed them. *Raynor v. Blatz B. Co.* 100 Wis. 414, 76 N. W. 343. It also appeared that the quantity of brick manufactured by plaintiffs for 1890 under this association agreement was but little in excess of what they actually did manufacture during each of the seasons of 1891, 1892, and 1893. It is true that plaintiffs stated that they were not directed to limit their manufacture to less than the full capacity of the plant for the years of the flood, but there is no evidence showing that they would have been required or permitted to run their yard to its full capacity during those seasons. It must be assumed that, since they were members of the association during the years of the flooding of which they complain, their output was subject to such regulation and restriction as it had been in the previous year, when an actual limit to the amount of their manufacture was imposed and submitted to. Under these circumstances, the trial court was amply justified in refusing to allow any damages for loss to business.

We can perceive no grounds upon which these facts in the case can be deemed irrelevant and immaterial, as contended by plaintiffs. It must clearly follow, when it is shown that plaintiffs, as members of this association, had submitted their business enterprise to its control and management, and had followed its directions in the management of their private property under the terms of the combination, that they were liable and subject to its control and direction throughout the period of their membership. When it so happens that this relationship causes them loss, they must suffer the consequences, as one of the perils incident to such an enterprise voluntarily undertaken by them.

The judgment must be modified by allowing the two items of damages, as indicated above, at the sum of $1,382.20, with interest thereon at the rate of six per cent. from the 1st day

of April, 1893, in addition to the amount allowed by the trial court.

By the Court.—The judgment is modified by increasing the damages recovered to the sum of $3,969.20, with interest in the sum of $1,965.55, and the costs in the sum of $86.89, making a total of $6,021.64, and, as so modified, the judgment is affirmed; appellants to recover their costs on this appeal.

A motion for a rehearing was denied January 10, 1905.

ILLINOIS STEEL COMPANY, Appellant, vs. JEKA and wife, Respondents.

October 18, 1904—January 10, 1905.

Appeal and error: Assignments of error: Waiver: Ejectment: Adverse possession: Construction of statutes: Cross-examination: Material and immaterial error.

1. Where no attention is paid in the argument to an assignment of error except to refer to the record and suggest: "While we submit that in portions of the charge of the court, to which exceptions were taken, as shown in the record, there was error, we will not trouble the court with further discussion of them," the supreme court will not search the record, carefully, to determine whether the instructions were, or were not, strictly accurate.
2. In an action of ejectment, the evidence on the subject of adverse possession, is *held* sufficient to carry that question to the jury.
3. In the determination of the question of adverse possession, possession dependent upon marked boundaries under subd. 1, sec. 4214, Stats. 1898, must not be confused with that accompanied by actual improvement of the premises under subd. 2 of said sec. 4214.
4. The physical taking and enjoyment by acts sufficient, reasonably, to suggest to the true owner that his dominion is thereby defied and the extent thereof, satisfies all the essentials of certainty as to the boundaries of adverse possession, dependent

on cultivation or usual improvement, and is sufficient to disseize the true owner, not only of the particular spot where the first visible disturbance of the surface occurred, but of surrounding land, the hostile possession of which is plainly thereby suggested.

5. Whether the essentials of adverse possession are satisfied or not by a given state of circumstances must be determined by the verdict of the jury, under proper instructions.
6. The use of cross-examination is not a mere privilege subject to discretionary judicial authority,—it is a right.
7. It is not prejudicial error to rule out a question asked for the purpose of laying the foundation for impeachment, when it refers to immaterial matter.
8. Rulings of the trial court, sustaining objections to questions asked on cross-examination, which are not clearly prejudicially wrong, will not be condemned on appeal.
9. In an action of ejectment, where the defense was twenty years' adverse possession, dependent on actual improvement of the premises, it is not error to sustain objections to a question calling for the precise boundaries of such possession, since it is only necessary that the premises should be put to use by acts of dominion, such as to suggest, reasonably, the extent of the hostile invasion.
10. It is not prejudicial error to refuse to permit a witness to answer a question, where, in answer to several other questions, he has given the information sought.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action in ejectment. The complaint was in the usual form. The defendants pleaded adverse possession under the ten and twenty years statutes. On the trial it was conceded that plaintiff was entitled to recover unless defendants were, upon evidence establishing their defense of adverse possession. Such evidence tended to, if it did not conclusively, show such possession by them and those with whom they were in privity from some time in 1881 to the commencement of the action February 26, 1896, unless the continuity thereof was broken by the John Selin, hereafter mentioned, acquiring of the holder of the record title a leasehold interest in the property. There was a conflict of evidence as to whether such circum-

stance occurred to carry the cause in respect thereto to the jury. There was evidence on plaintiff's part, supposed by the trial court to be sufficient to carry the question involved to the jury, that Jacob Muza as early as 1873 took possession of the disputed premises in defiance of the true owner and thereafter remained continuously in the actual, hostile, exclusive and notorious occupancy thereof till in 1881, when he sold the same for a trifling sum to John Selin, giving him no paper transfer thereof; and that Selin and those claiming under him continued the adverse possession existing at the time of such transfer until the commencement of this action, by these circumstances: As soon as Selin received the property from Muza he inclosed the same with a fence, built a house thereon and occupied it as a home for himself and family. The condition thus created was continued until some time in 1893 when Selin sold the premises to Joseph M. Konkel, not giving him any paper transfer thereof. Konkel upon so receiving the property took possession thereof and prepared it for use by a tenant. It was occupied accordingly for a short period of time when Konkel sold the property to defendant, *Xavier Jeka,* not giving him any paper transfer thereof. *Jeka* upon so receiving the property, took possession thereof and occupied the same till the action was commenced.

The main contention upon the trial was whether there were possessory acts of the disputed premises by Muza sufficient to satisfy the statute as to what is essential to disseise the true owner of land so as to create adverse possession thereof by another, and if there were such acts whether the condition thus created was continued for a sufficient length of time, prior to the commencement of Selin's possession, to make with the period that elapsed thereafter, before the commencement of this action the full period of twenty years requisite to satisfy the statute. Muza did not inclose the premises or put any structure, strictly speaking, thereon. The most the evidence tended to show he did in regard to the premises, is

fairly indicated by the following brief summary of his evidence:

I improved the property in dispute from 1872 till I gave it to Selin. I improved it as I could, filling the same with stones and ashes and what I could get. I did that just as for myself. My brother was coming from the old country. I was preparing the premises for him. I did the first filling in 1873. I did filling every year thereafter till I sold to Selin. I cut willows and wheeled ashes and filled in on the property. No one interfered with my work. I claimed to be the owner of the property from the time I commenced filling till I gave it to Selin. I do not know how long the tract of land was or how wide it was. I did not measure it. It was all marsh around where I filled. When I gave the property to Selin it was water and marsh around it. There was a ditch on the property washed out and I filled that. There was water on the property when I transferred it to Selin, but I do not know how deep it was. There was nothing to show just where the boundaries of the property were, till I staked it out at the time of the sale to Selin. It was all marsh when I took possession. I filled it extra because I wanted to fix it up for my brother. I did more on that property than on the rest of the marsh. My brother did not come from the old country so I gave the property to Selin. I staked it out for him at the time. The Selin lot was higher than the rest of the marsh. All the lot was high. I filled it so it was higher.

There was considerable evidence corroborating the foregoing and much evidence discrediting it, both in Muza's cross-examination and the testimony of other witnesses. There was evidence tending to show that Muza settled near the premises in dispute some time in 1873 and maintained a home there for many years continuously; that the Selin premises were part of a marshy tract of land north of the mouth of the Milwaukee river and between Lake Michigan and the river, called "Jones Island;" that Muza from the time he entered thereon, as aforesaid, assumed, at least, leadership in appropriating the island for residence and other purposes; that he generally, somewhat as an owner would, directed the

improvement of the island by filling in low places and protecting the land from inroads by water from the lake.

The jury found, in effect, as follows: When this action was commenced the paper title was in plaintiff. Defendants and their grantors and predecessors in title occupied the premises continuously for more than twenty years before the action was commenced. Such occupancy was actual, open, notorious, exclusive and continuous and reasonably sufficient to attract the attention of the true owner and put him on inquiry as to the nature and extent of his rights. Defendants were in possession of the property when the action was commenced. They did not unlawfully withhold the same from the plaintiff. Judgment was rendered thereon for defendants. Such proceedings were duly taken on behalf of the plaintiff as to preserve for consideration upon appeal the questions discussed in the opinion.

For the appellant there was a brief by *Van Dyke & Van Dyke & Carter,* and oral argument by *W. E. Carter.*

For the respondents there was a brief by *Fiebing & Killilea* and *M. C. Krause,* and oral argument by *H. J. Killilea.*

The following opinion was filed November 15, 1904:

MARSHALL, J. The foregoing brief statement, it is believed, brings to view all of this case necessary to an understanding of the few questions discussed in the brief of appellant's counsel.

As we understand it, counsel do not expect the case to be examined other than sufficient to enable the court to pass upon their claims that the verdict is unsupported by evidence, which is involved in each of three assignments of error, and that the trial court erred in the admission and rejection of evidence. True, there is an assignment suggesting that improper instructions were given, but no attention is paid thereto in the argument except to refer to the record for the instructions excepted to, and suggest this:

"While we submit that in portions of the charge of the court, to which exceptions were taken, as shown in the record, there was error, we will not trouble the court with further discussion of them."

Since there is no antecedent of the words "further discussion of them" and the procedure here, well known to the learned counsel, is that an assignment of error unaccompanied by any argument pointing out the particular matter referred to and giving reasons, or attempting to, why it should be held well taken, is not to be regarded as necessarily calling for examination,—we feel warranted in concluding that it is not expected that we shall search the record, carefully, to determine whether the instructions were, or were not, in all respects, strictly accurate.

The question of whether there was evidence to legitimately carry to the jury the subject of the alleged adverse occupancy of the disputed premises by Muza for several years prior to the commencement of Selin's occupancy thereof, which is a vital point in the case, must be examined in the light of principles stated in previous cases involving similar evidence as to various parts of "Jones Island," so called. There was a claim of adverse possession by Muza in each of such cases, dependent for its efficiency upon whether his acts were sufficient to disseise the true owner, set the statutory period of twenty years of such condition running and preserve it until it merged into a like condition caused by the acts of another in privity with him. This case seems to have been fairly submitted to the jury in the light of such previous adjudications. *Illinois S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *Illinois S. Co. v. Budzisz,* 115 Wis. 68, 90 N. W. 1019; *Illinois S. Co. v. Jeka,* 109 Wis. 449, 84 N. W. 1119; *Illinois S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402; *Illinois S. Co. v. Jeka,* 119 Wis. 122, 95 N. W. 97; *Illinois S. Co. v. Budzisz,* 119 Wis. 580, 97 N. W. 166. See, also, *Batz v. Woerpel,* 113 Wis. 442, 89 N. W. 516.

No reason is perceived why any question decided in those cases, which is material to this one, should be reconsidered. It is believed that the decisions, there necessarily resulted from secs. 4207, 4213, and 4214, Stats. 1898, and elementary principles long and firmly established. The mere fact, if it be a fact, that such principles and the calls of the statutes were somewhat more definitely pointed out in such cases, or some of them, than theretofore, and that some misunderstanding existed by reason of unguarded expressions in previous opinions, here and there, should not be mistaken for the establishment of any new doctrine. It is not infrequent that courts find a very old and familiar rule to have become so involved by mere phrasing thereof, or illegitimate applications of the same, or both, that a new point to refer to is seen to be essential to certainty in its administration. That suggests a review of the subject, involving a restatement of the rule with an attempt to refer to new, or to bring again into prominence old, indications of its limitations and scope. Having done that, the danger of losing the beneficial effect thereof is generally best avoided by, for a time at least, pointing to the law as thus declared when the subject is again presented calling for its application, rather than by discussing the matter anew.

It cannot be doubted that if Muza entered upon the premises in dispute, as testified to by him, and commenced filling in the low places, indicating to the true owner, if he paid reasonable attention to his property, a hostile purpose to adversely appropriate such premises, he thereby effectually planted thereon the standard of a hostile invader. As soon as the first significant visible work of improvement was made it was notice to the true owner not only of such hostile invasion, but of the nature thereof. It is not the law, as we understand it, that the filling in of low places upon premises as testified to in this case constitutes, necessarily, taking actual possession only of the particular places filled, and that

in order to take such possession of a parcel of land such as that in question for a building spot by filling the same up, it is necessary to raise the entire surface thereof so as to indicate with precision by visible marking the precise extent of the hostile invasion.

In considering this subject one should not confuse adverse possession, dependent upon marked boundaries under subd. 1, sec. 4214, with such possession accomplished by actual improvement of the premises under subd. 2 of the said section. In the latter class of cases the physical disturbance of the premises by putting the same to some use to which they are adapted, sufficient to disseise the true owner, may affect by relation the surroundings, so far as the nature of such disturbances naturally suggest the claim of dominion by the adverse occupant extends. In a territory suitable for cheap residence lots, and occupied by numerous persons as such, a hostile entry and commencement of improvement plainly indicating a purpose to lay out such a lot, might well be held sufficient to disseise the true owner, not only of the particular spot where the first visible disturbance of the surface occurred, but of surrounding land, the hostile appropriation of which is plainly thereby suggested. Such being the case much of the infirmity which appellant's counsel seem to think exists in defendant's case as to Muza's possession is readily seen not to exist in fact, even if it be considered that there is no evidence that he graded the lot so as to visibly change the entire natural surface therof. It must be conceded that there is much evidence that he entered upon the premises and did filling thereon, from time to time and year to year, for five or six years prior to the commencement of Selin's possession, and that there is some evidence that he created an artificial surface over the entire premises. True, his cross-examination and the evidence of several witnesses tend to show that no visible change in the premises was wrought by him, but

that merely rendered the truthfulness of his claim in that regard a jury question. Such being the case, in view of the law that physical taking and enjoyment by acts sufficient, reasonably, to suggest to the true owner that his dominion is thereby defied and the extent thereof, satisfies all the essentials of certainty as to the boundaries of adverse possession, dependent upon cultivation or usual improvement, the case was properly submitted to the jury.

True, as counsel suggest, the disseisin of the true owner and constructive adverse possession that will take away title from one and vest it in another must be exclusive, hostile, continuous and notorious, and where there is no paper title to refer adverse occupation to, indicating constructively the boundaries thereof, there must be actual possession of a nature to clearly acquaint the true owner with the fact that his rights are set at defiance and the extent thereof. It must not be supposed that the law in that regard, so often declared by this court, is not fully appreciated in applying the same as we do to the evidence in this case. It is often easy to state a rule of law, and not easy to apply it to a mass of evidentiary matters. What acts are necessary to notify the true owner of land of a hostile invasion thereof; and what are necessary to indicate the territorial limits of such invasion and what are necessary, if disseisin shall have once been effected, to efficiently indicate continuance thereof necessarily varies with the size of the premises claimed, the location thereof, the character of the same and a great variety of circumstances. Hence, generally, whether the essentials of adverse possession are satisfied or not by a given state of circumstances must be determined by the verdict of a jury, under proper instructions.

While, as before indicated, the law on this subject was so fully discussed in the former cases referred to that no further discussion thereof is needed, we may well give emphasis

thereto by quoting from the opinion of the court in the leading case in California, *Brumagim v. Bradshaw,* 39 Cal. 24, 45, the following:

"Acts of dominion over a town lot, which would be sufficient to establish an actual possession, might be wholly inadequate to that end, as applied to a tract of one thousand acres; and, on the other hand, the herding of cattle, for a reasonable time, on a tract of one hundred acres, suitable only for that purpose, and accompanied by a claim of title, might, under certain circumstances, establish possession of it; whilst the pasturing of cattle on a town lot, suitable only for building purposes, would be wholly insufficient. The general principle which underlies all this class of cases is, that the acts of dominion must be adapted to the particular land, its condition, locality and appropriate use. The philosophy of the rule is, that by such acts the party proclaims to the public that he asserts an exclusive ownership over the land, and the acts which he performs are in harmony with his claim of title. Hence they must be such as to give notice to the public; or, in the language of Justice BALDWIN, in *Wolf v. Baldwin,* 19 Cal. 313, it must be 'an open, unequivocal, actual possession—notorious, apparent, uninterrupted and exclusive—carrying with it the marks and evidences of ownership.' "

The elucidation and application of the principle thus stated in *Illinois S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, leaves no very good reason for going astray under the delusion that adverse possession without an inclosure must necessarily be characterized by a physical, constant, visible occupancy by improvement of every part of the premises,—that the hostile invader must actually lay his hands, so to speak, upon the entire territory and keep them there as plainly indicating the extent and character of the occupancy as if such premises were covered by a mantle. The words of the statute do not expressly, nor by reasonable implication, suggest any such thing, nor can any authority in support thereof be found. The judicial declarations generally, rightly

understood, are in harmony with this, as for example in *Booth v. Small,* 25 Iowa, 177, the court said:

"Possession of land is the holding of an exclusive exercise of dominion over it. It is evident that this is not and cannot be uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy, literally, the whole tract,—he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hand. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold possession, in fact, of uninclosed land by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable and acquire the profits it yields in its present condition. Such acts being continued and uninterrupted will amount to actual possession."

True, the Iowa court did not have the precise statutory aid to guide it which we have, but that does not impair the force of the quotation since the "use in the usual way" of the common law which such court evidently had in mind is substantially the same as "usually improved" in our statutes.

Under the assignment of error relating to rulings on evidence, numerous instances are cited to our attention where questions on cross-examination were ruled out. We shall not review the same in detail. We are persuaded that the trial judge restricted the cross-examination rather too closely. It must be borne in mind that cross-examination is regarded one of the most efficient means of discovering the truth, and so long as there is any reasonable ground to suppose that it is being pursued legitimately it should not be disturbed. Often it is the only weapon available for laying bare a tissue of falsehoods having all the semblance of truth. The use of it is not a mere privilege subject to discretionary judicial authority,—it is a right. The judge may regulate its use, stopping just short of any disturbance of the right itself. To go further is

improper. The right is so valuable to litigants and the opportunity to abuse it so constant and often embraced that some regulation thereof from the bench is necessary. Few judicial duties require greater care in performance than that of so guarding and restricting cross-examination, attempted, as to prevent the latter without impairing the former. There is some ground for holding that there was a failure in that regard in this case, but whether to such a degree as to prejudice appellant has given us some trouble.

This question propounded to Muza was ruled out: "When you testified before in the Alexander Budzisz case, didn't you swear that you did not know that you ever fished in Oshkosh alone?" We are unable to perceive how the answer to that, one way or the other, could have had any material bearing. It was obviously asked to lay a foundation for impeachment on the theory that a considerable period of absence by Muza from the vicinity of the premises in dispute would break the continuity of his possession thereof. It does not seem to have been given proper significance that the extent of the occupancy in this case, unlike that in some others, was not necessarily dependent upon substantially continuous presence of the disseisor at or in the immediate vicinity of the premises. After the adverse occupancy was commenced, if we may believe the testimony of Muza, he created such changes in the physical condition of the land as to indicate clearly a hostile invasion of the true owner's rights. Having raised his flag, so to speak, on the premises by commencing the preparation thereof for a residence lot, absence therefrom thereafter for any period of time, short of such as to indicate abandonment of such purpose, would not, as a matter of law, break the disseisin. The standard of the invader being once efficiently planted by some physical change in the surface of the land, sufficient to disseise the true owner, it might under such circumstances be relied on to preserve such condition for a reasonable length of time. Absence from the premises for a

short interval may be immaterial, the true owner not asserting any right thereto in the meantime, there being a return to the same by the disseisor and further acts thereon by him consistent with the first invasion, clearly indicating a continuance thereof. If the disseisor relies on acts to show his possession, which require his personal presence, such as prohibiting others from going upon the property and customary use of same for fishing and fowling, as in some of the "Jones Island" cases, his absence for even short periods of time might be quite material. Under the circumstances of this case it does not seem that the fact, if it be a fact, that Muza was engaged in a fishing venture for a short time at Oshkosh, either with another or alone, was so clearly material as to warrant us in disturbing the decision of the trial judge.

It is not reversible error to rule out a question asked to lay the foundation for impeachment when it refers to immaterial matter. Jones, Evidence, § 855; *Waterman v. C. & A. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136; *Schuster v. State,* 80 Wis. 107, 49 N. W. 30; *Kaime v. Omro,* 49 Wis. 371, 5 N. W. 838. Every such question, upon objection being made, presents for consideration whether the statement suggested thereby to have been made and to be inconsistent with one made on the trial, is material. The trial judge's decision on that goes to competency and must prevail on appeal, unless clearly wrong. Of course, if the subject of the interrogatory is material, he has no discretion as to whether or not to permit the foundation for impeachment to be laid,—it is a matter of absolute right, not a mere privilege. Jones, Evidence, § 855. The ruling under discussion, it seems, cannot be condemned as clearly wrong, so cannot be at all. Several other rulings cited to our attention are governed likewise. We will therefore not further refer to them.

Muza was asked whether he did not testify, on a former occasion, that his possession of one part of "Jones Island" was the same as that of any other; that his right was the same in

one place as in any other and that his claim of right was likewise the same. Some reasons occur to us why those questions could be rightly regarded immaterial. However, the rulings are of such doubtful propriety that a contrary disposition of the matter would strike us with more favor. The circumstances under which it was claimed the witness testified, as suggested in the questions, were not made to appear. The trial judge, notwithstanding the notoriety of the "Jones Island" cases, could not take judicial notice of such circumstances, nor could the jury view them as matters of common knowledge. The suggested evidence may have been very material on a former occasion and not material on the trial of this case. If, on such occasion, there was no serious question but that Muza took and held adverse possession of some part of the island by creating and maintaining structures thereon and no question but that there were other parts thereof, which, during the period of his claim, were in the possession of others acting independently of him, and yet he alleged adverse possession of the entire island, on the greater part of which there were no visible indications thereof, and the title to some such portions was dependent on the validity of his general claim, a statement by him that his "possession," "claim," or "right" as to one part of the island was the same as that of any other, might be quite sufficient and important on a subsequent trial involving similar circumstances in contradiction of evidence inconsistent therewith, and yet be immaterial as to a claim of adverse possession to a small part of the island, grounded on actual, continuous improvement and occupation of that particular part. In the absence of any indication in the questions, or otherwise, of similarity of circumstances on this trial, to those characterizing the alleged former statements, it is not clear that the court was wholly without justification for holding that such statements, which at best seem to have been merely the witness' conclusions, dependent, perhaps, upon his idea of his legal rights, were im-

material. The court was influenced, it seems, by the fact that, the controversy here was necessarily to turn on whether the physical condition of the particular premises in question was so changed by Muza as to sufficiently evidence to the true owner a hostile invasion of his rights, and a disseisin of him thereof continuously for several years. We cannot see clearly that the rulings were prejudicially wrong, and therefore decline to condemn them.

Complaint is made because this question, propounded to Muza, was ruled out: "Did the south boundary of the Selin lot extend down to the old harbor?" The claim that the ruling on that is wrong is based on the idea that it was essential to adverse possession by Muza that the precise boundaries of such possession should be marked in some way. That is wrong as we have seen. It was only necessary that the premises should be put to use by acts of dominion over the same, such as to suggest reasonably the extent of the hostile invasion. If a house had been constructed thereon and dominion exercised by the invader over territory in the vicinity of the structure for a reasonable space adjacent thereto by acts similar to those of an owner of a dwelling generally, we apprehend that no one familiar with the law would claim that the adverse occupancy was limited to the particular space covered by the structure, or that it would be essential to adverse possession of the surrounding territory to the extent ordinarily used in connection with a dwelling house of the nature of the one so constructed that it should be staked out and fenced, or the boundaries otherwise marked by physical objects. For example, a highway by user, is not confined to the wagon path. It is deemed to extend on either side thereof sufficient to satisfy the needs of the public for such highway. Under some circumstances, it might be held to extend to the full width of a legal highway. *Bartlett v. Beardmore,* 77 Wis. 356, 46 N. W. 494; *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819; Elliott, Roads & S. § 174. Upon the principle

we have referred to, many courts have held that a highway by adverse occupancy is of the full width of a legal highway. That such width is suggested by the existence of the wagon path. *Whitesides v. Green,* 13 Utah, 341, 44 Pac. 1032; *Sprague v. Waite,* 17 Pick. 309; *Marchand v. Maple Grove,* 48 Minn. 271, 51 N. W. 606; *Bowers v. Barrett,* 85 Me. 382, 27 Atl. 260; *Pillsbury v. Brown,* 82 Me. 450, 19 Atl. 89; *Davis v. Clinton,* 58 Iowa, 389, 10 N. W. 768.

Complaint is made because Muza was not permitted to answer this question: "Now tell us what more you did on this lot than on others." Irrespective of whether the ground upon which that question was ruled to be improper, the ruling was not prejudicial, inasmuch as the witness gave the information sought, in answer to several other questions. He testified that he filled the lot preparatory to use thereof as a home for his brother; that he did not treat it as he did the island generally; that he filled it.

Viewing the complaints as to rulings on evidence in groups, all have been considered. Counsel call attention in a general way to a large number of such rulings by referring to the pages of the printed case where they can be found. We have given such attention thereto as to enable us to discover that counsel were warranted in saying the rulings made the basis for argument are fair samples of all, to which objection was made. Consideration of the samples includes the whole. We have not been able to discover any sufficient ground for reversing the judgment appealed from.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied January 10, 1905.

KELLER, Appellant, vs. FENSKE, Respondent.

October 19, 1904—January 10, 1905.

Life estates: Relations of life tenant and remainderman: Record of conveyances: Constructive notice: Purchase of outstanding title by life tenant: Accounting.

1. The owner of lands, subject to a mortgage, conveyed the same to plaintiff, reserving to his wife a life estate, the life tenant being in possession. This mortgage was foreclosed, both the life tenant and plaintiff being made parties to the action. At the foreclosure sale the property brought just enough to satisfy the foreclosure judgment with interest and costs of sale. The purchaser, having received the sheriff's deed, conveyed the premises to the life tenant in consideration of the sum paid by him upon the sheriff's sale. The life tenant thereafter, by warranty deed, conveyed the premises to defendant, who, after her death, took possession. All the conveyances were duly recorded at about the time they were respectively executed. *Held*, that defendant took title from the original life tenant with knowledge of its burdens and restrictions, as between the tenant for life and the tenant in remainder.
2. In such case, the life tenant having been in possession, collecting and using the rents and income from the date of the deed creating her estate until her death, the purchase by the life tenant under the foreclosure sale is *held* to have been made for the joint benefit of herself and the tenant in remainder, precluding the life tenant from holding it for her exclusive benefit, if the tenant in remainder will contribute her proper share of the sum so paid.
3. In such case, whatever the life tenant pays above her proportionate share is secured to her as a creditor, and she becomes subrogated to that extent to the rights of the lien holder in the real estate so purchased.
4. In such case, the life tenant, who paid off the mortgage, and who conveyed to defendant by warranty deed, is *held* to have conveyed not only her life estate, but also the lien on the land which she acquired by reason of her payment of the mortgage.
5. In such case, on an accounting between the tenant in remainder and the grantee of the life tenant, such grantee having acted in good faith, he should be charged with the income of the

estate from the termination of the life estate, less the amounts paid by him for taxes on the premises. The grantee should also recover for such sums as he has paid for improvements and to preserve the property since taking possession, and also the amount of the mortgage lien, less the interest paid thereon.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

An action in equity wherein plaintiff seeks to redeem from defendant's interest in certain real estate. She asks for an accounting, and the right to discharge the defendant's lien by payment of such sums as may be found due from her, and to be adjudged the owner of the premises. Defendant admitted most of the facts as alleged in the complaint, but averred that he was the owner in fee of the premises, free from any claim, right, or interest, and denied that plaintiff had any right to or interest in the premises to entitle her to the relief demanded.

The material facts of the case, covered by the pleadings and findings of the court, are clearly and concisely set forth in the statement of appellant's brief, which we will adopt, and is as follows:

"Prior to March 15, 1894, one Caroline Laabs was the owner in fee simple of a certain lot in the Thirteenth Ward of the city of Milwaukee, particularly described. In December, 1890, she and her huband had incumbered this lot by a mortgage in the amount of $800, securing a note in such amount; and such mortgage was duly recorded in the office of the register of deeds of Milwaukee county the day after its execution. On March 15, 1894, Caroline Laabs and her husband conveyed the lot by warranty deed to one Frederick William Fenske, subject to the incumbrance of $800, which was assumed by the grantee. Frederick William Fenske and Louise, his wife, entered into possession of the premises; and on March 24, 1896, they executed and delivered to the plaintiff the deed. . . . The plaintiff, *Louise Keller,* was at the time of beginning the action a married woman; but in 1896 and until 1902 she was unmarried, and bore the name of *Louise Sood,* and is the grantee in remainder named in

such deed. In such deed Frederick William Fenske and his wife conveyed the real estate in question to the plaintiff, reserving to Louise Fenske an estate therein for the period of her natural life. This deed was duly recorded in the office of the register of deeds of Milwaukee county on March 31, 1896, and Louise Fenske entered into possession of the premises, and became seised of a life estate therein, and the plaintiff became seised of the estate in remainder. The principal sum of the mortgage incumbrance on the premises remained unpaid, and there was no interest paid upon the incumbrance after the period ending June 15, 1897. By reason of the default in the payment of principal and interest, the mortgagee instituted a suit for the foreclosure of the mortgage, making both Louise Fenske and the plaintiff parties defendant, and serving them with process, and filing notice of *lis pendens* in proper form. In such foreclosure action on December 18, 1897, judgment of foreclosure and sale in the usual form was entered, in the amount of $824.40, for the amount due upon the note and mortgage for principal and interest since June 15, 1897, and for $171.96, solicitor's fees, costs, and disbursements. The judgment of foreclosure remained wholly unpaid, and after the expiration of the year for redemption the premises were advertised for sale pursuant to the judgment, and sold by the sheriff on February 13, 1899, to W. H. Timlin, for the sum of $1,092.86, which sum was sufficient to pay the costs and expenses of the sale and the amount due upon the judgment and interest in full, leaving neither surplus nor deficiency. A sheriff's deed was executed and delivered pursuant to the sale, and recorded, and report of sale filed, and sale confirmed. Three months thereafter and on May 11, 1899, Louise Fenske . . . procured . . . a warranty deed of the same to be executed to her by W. H. Timlin and wife, and she paid therefor the sum that had theretofore been paid upon the sheriff's sale, and this deed was duly recorded. This deed was executed to Louise Fenske alone as grantee, and continuously from March 24, 1896, and until her death, she remained in possession of the premises, enjoying the use, income, profits and benefits thereof; and the rents, income, profits, and use of the real estate at all times exceeded in amount and value the amount of the interest on the mortgage indebtedness, together with the taxes and all other ex-

penses of maintaining the property. . . . On February 2, 1903, the defendant, *William F. Fenske,* obtained from Louise Fenske a warranty deed of the premises, which he caused to be recorded. Louise Fenske died on April 5, 1903. . . . All the conveyances referred to in the complaint were executed, witnessed, and acknowledged so as to be entitled to record. Before the commencement of the action, and after the death of Louise Fenske, the plaintiff offered to the defendant to redeem the premises from such incumbrance as may have existed in favor of Louise Fenske by her subrogation to the mortgage in the amount advanced by her for the discharge of the principal thereof and the costs of foreclosure, and not repaid to her, which incumbrance had become vested in the defendant by conveyance to him from Louise Fenske; and the plaintiff demanded of the defendant a statement of such amount, that she might pay the same, and that the defendant release and quitclaim to her the premises on payment of such amount; and the defendant refused to release or quitclaim the premises to the plaintiff upon any terms whatsoever, and denied her interest therein."

The court, in its findings, stated:

"That the plaintiff was the niece of Frederick William Fenske, one of the grantors in the deed of March 24, 1896, and the plaintiff was at such time and until the year 1902, a minor; that the amount paid by the purchaser at the foreclosure sale on February 13th, 1899, for the sheriff's deed was $1,092.86, which was sufficient to pay the costs and expenses of such sale, the amount due upon the judgment, and interest, in full, leaving neither surplus nor deficiency, and that, of such amount, $81.53 represented interest accrued and unpaid upon $800, the principal sum of the mortgage, leaving $1,011.33, representing the principal of the mortgage indebtedness (without interest thereon), and costs, solicitor's fees, and expenses of sale; and that no interest on the mortgage incumbrance was paid after June 15, 1897. The findings further show that the defendant paid, as consideration for the execution and delivery to him of his deed from Louise Fenske of February 2, 1903, an amount not in excess of $400, and that there was no other or further consideration for such deed, and that on May 8, 1903, and before the commencement of the action, the plaintiff demanded of the defendant the right

of redemption, and offered to redeem the premises from defendant's claim, which demand and offer were refused, substantially as alleged in the complaint; that the defendant, after going into possession of the premises, expended upon the same for necessary repairs the sum of $150, and had up to the time of the trial of the action, namely, January 27, 1904, collected as rents of the premises the sum of $94, and that the rental value of the premises was in excess of the taxes thereon and interest upon the sum of $1,161.33; and that the plaintiff had on May 9, 1903, filed notice of *lis pendens* in the office of the register of deeds of Milwaukee county, and filed her complaint in this action."

Upon these facts the court ordered judgment in favor of the defendant, dismissing the complaint, and judgment was entered accordingly. This is an appeal from the judgment.

For the appellant there was a brief by *Timlin & Glicksman,* and oral argument by *Nathan Glicksman.*

For the respondent there was a brief by *J. M. Clarke* and *Howard Van Wyck,* and oral argument by *Mr. Clarke.*

The following opinion was filed November 15, 1904:

SIEBECKER, J. The court found that defendant went into possession of the premises under warranty deed from the life tenant immediately upon her death, and "that he received and accepted the deed . . . and entered into possession of the premises without any knowledge of any claim of right to or interest therein by the plaintiff." It appears by the above statement of facts that the record of all the conveyances and foreclosure proceedings disclose that the interest in the premises at the time the foreclosure proceedings were instituted was apportioned between the defendant's grantor, as life tenant, and plaintiff, as tenant in remainder, and that defendant's grantor had acquired and held the title obtained at the sale of the premises under the decree of foreclosure. The defendant took the title from the original life tenant with knowledge of its burdens and restrictions, as between herself and the tenant in remainder, under the rule that the record-

ing of a deed entitled to record is constructive notice of its existence and contents to all subsequent purchasers of the land, and which holds them to have knowledge of what appears on the face of the title under which they claim. *Pringle v. Dunn,* 37 Wis. 449; *Weeks v. M., L. S. & W. R. Co.* 78 Wis. 501, 47 N. W. 737; *Gilchrist v. Foxen,* 95 Wis. 428, 70 N. W. 585.

It appears that the original life tenant, Louise Fenske, was in possession of the premises at the time of the issuance of the sheriff's deed under the foreclosure sale on February 13, 1899, and that she continued in such possession, collecting and using the rents, from the date of this sale to the time she obtained the outstanding title under the foreclosure sale, and until her death. The defendant claims the right to the possession under deed from her from the date of her death. These facts show that the relationship of life tenant in possession and tenant in remainder subsisted at the time the life tenant purchased the outstanding title obtained at the foreclosure sale. Under these circumstances, the law regards this purchase by the life tenant as made for the joint benefit of herself and the tenant in remainder, and percludes her from holding it for her exclusive benefit, if the tenant in remainder will contribute her proper share of the sum paid for the interest thus acquired, which inures to the benefit of both. Whatever amount the life tenant paid above her proportionate share is secured to her as a creditor, and she becomes subrogated to a lien on the real estate so purchased. *Phelan v. Boylan,* 25 Wis. 679; *Melms v. Pabst B. Co.* 93 Wis. 140, 66 N. W. 244; *Allen v. De Groodt,* 98 Mo. 159, 11 S. W. 240; *Whitney v. Salter,* 36 Minn. 103, 30 N. W. 755; *Daviess v. Myers,* 13 B. Mon. 511; *Hunter v. Bosworth,* 43 Wis. 583.

There is nothing in the findings of the court to show that an account was stated between the parties as prayed for by plaintiff, should it be found that she is entitled to the relief asked for. This is, no doubt, due to the fact that the court

found that plaintiff had no interest in the property, and therefore had no right to an accounting. Since we find that plaintiff became the owner of the premises in fee simple at the termination of the life estate on the 5th day of April, 1903, the date of the life tenant's death, it follows that the judgment must be reversed, and the action remanded, with directions that the court proceed to take the necessary proof for an accounting upon the matters involved, and incorporate the result in a judgment which shall establish plaintiff's title to the premises. In the accounting the defendant should be charged with the income of the estate from the termination of the life estate, namely, April 5, 1903, less the amounts paid by him for taxes on the premises. Defendant is to recover such sums as he may have paid for improvements and to preserve the property since taking possession under the alleged deed of February 2, 1903. The right to reimbursement for improving and preserving the estate since taking possession is based upon the facts found by the court, that defendant acted innocently and in good faith under a mistake as to the true condition of the title. 3 Pomeroy, Eq. § 1241.

The plaintiff is liable to the estate of the life tenant for the sum paid by the life tenant to purchase the outstanding title, less the interest paid thereon.

By the Court.—It is so ordered.

After the filing of the opinion and decision in this case on November 15, 1904, the appellant moved the court to correct the judgment so as to provide that there be paid, as a condition of plaintiff's relief, directly to the respondent, the amount paid by his grantor to purchase the outstanding mortgage title, less the interest thereon.

The following opinion was filed January 10, 1905:

PER CURIAM. After due consideration, we see no escape from the view that Louise Fenske, the life tenant, who paid off the mortgage, did, by her warranty deed to the respondent,

convey not only her life estate, but all the lien on the land which she acquired by reason of her payment of the mortgage. *Larsen v. Johnson,* 78 Wis. 300, 47 N. W. 615; *Slaughter v. Bernards,* 97 Wis. 184, 72 N. W. 977. As a result, all claims which she had to or upon that land, and which the plaintiff would have been required to satisfy under the principles declared in the opinion in this case, became vested in the respondent; and he is entitled to be paid not only the several sums indicated in the opinion originally filed, but also the amount of this mortgage lien.

It is therefore ordered that the judgment and mandate of this court be amended so as to direct that, as a condition of judgment in favor of the plaintiff, there be paid to the defendant the several sums indicated in our former opinion, including that therein directed to be paid to the estate of Louise Fenske.

THE STATE EX REL. LEONARD, Respondent, vs. ROSENTHAL, Appellant.

November 15, 1904—January 10, 1905.

Elections: Quo warranto: *Pleading: Statutory requirements: Cause of action: Demurrer* ore tenus: *Witnesses: Evidence: Hearsay: Names:* Idem sonans: *Cross-examination: Credibility: Public records: Non-existence of specific document or entry: Declarations of voter:* Res gestæ: *Instructions to jury: Presumptions: Burden of proof: Special verdict.*

1. Where a statute imperatively requires a complaint to state a certain fact, such averment is essential to the cause of action.
2. Under sec. 3468, Stats. 1898, providing, among other things, that in actions of *quo warranto,* involving title to a public office, it shall be necessary for the relator to state in his complaint the actual number of legal votes cast for the relator *and for the defendant,* a complaint which states the actual number of legal votes cast for relator, but omits to state, either directly

or by implication, the number of legal votes cast for the defendant, is fatally defective, and a demurrer *ore tenus* thereto should be sustained.

3. In an action of *quo warranto* to test title to the office of assessor of a village, witnesses who did not live in the village at the time of the election, but went into the village some weeks afterwards, testified that they then made systematic inquiries at various manufacturing establishments and boarding houses in the village, as well as of residents of the village, as to whether certain alleged illegal voters were known to reside in the village on election day. These witnesses were then allowed to testify, against objection and exception, that, from such investigation, they were not able to find that such voters resided in the village on election day. *Held*, that the great practical difficulty of proving non-residence did not justify the admission of such evidence in violation of the rule excluding hearsay evidence.

4. In such case, in order to qualify the witness to testify as to the residence in the district of one alleged to be an illegal voter, it is not absolutely necessary that the witness should have actually resided in the election district at the time of the election, but he should show that, at the time, he was to some substantial extent acquainted with the inhabitants of the district.

5. Where two names appeared on the poll list of an election as Frank Bersche and George Long, it is not error to admit evidence that they were non-residents, where it was alleged in the complaint that two of the votes claimed to be illegal were cast by Frank Bierse and George Lang.

6. In an action to test defendant's right to an elective office, a witness for relator, after having testified to making extensive investigations after the election as to the residence of a number of alleged illegal voters, in the course of which he went to another city, was asked on cross-examination whether relator did not pay him for his time, and also the expenses of his trip. *Held*, that it was error to sustain objections to such questions, since it is competent on cross-examination to show the relations existing between the witness and the parties to the action, as bearing on his credibility.

7. At common law the fact that a specific document or entry did not exist in public records might be proven by the testimony of the custodian or of any one who had made a search of the records for that purpose, and such rule is not changed by sec. 4163, Stats. 1898 (providing for official certificate that a document, etc., cannot be found).

8. The non-residence of one in a particular town, village, or city cannot be proved by testimony that a person of the same name was found to be included in the directory of a nearby populous city.
9. The voluntary declarations of a voter who voted at an election, that he was not a resident of the voting precinct at that time, are admissible.
10. It is error to instruct the jury that the burden of proof is on both parties litigant at the same time.
11. When one has been declared elected by the board of canvassers of the election, and is holding the office under such determination, a presumption is created that he received the number of votes stated in the certificate, and casts on his opponent the burden of showing that the certificate is false.
12. In such case, when such presumption is rebutted by competent evidence, it then devolves upon the one holding the office to establish the fact that he received the greater number of votes by other evidence, in order to prevent judgment of ouster.
13. In *quo warranto* to try title to an elective office two questions should determine the case: How many legal votes were cast for the relator, and how many legal votes were cast for the defendant?

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action of *quo warranto* brought by the relator to remove from the office of assessor of the village of West Allis the respondent, *August Rosenthal.* The complaint, after alleging the corporate existence of the village of West Allis, and the fact that the relator was a resident and elector of said village on the 7th of April, 1903, alleges that an election for village officers was held on the last-named date, and that prior to said election the relator was duly nominated for the office of assessor of the village on the Republican ticket, and that the defendant was the nominee for said office on the People's ticket, and that no other candidates were voted for at said election; that at said election 456 ballots were found to have been cast by the canvassers, of which eight were defective and not counted; that the relator received 218 legal votes; that

there were cast for the respondent at said election a large number of void and fraudulent votes, the total number of which "the relator is unable to state, but that the same exceeds thirty;" that twenty-nine persons (whose names are given) voted at said election for the defendant and the People's ticket who were, for various reasons, not qualified electors of said village; that various persons fraudulently attempted to, and did, colonize men in said village for the purpose of voting at said election, who were not qualified electors of said village, and succeeded in procuring said persons to vote the People's ticket; that the total number of votes cast for assessor was 436, including those cast by persons not qualified electors of the village; that the 218 votes lawfully cast for the relator was a majority of all the legal votes cast for the office of assessor, and that the relator was thereby duly elected; that on April 15, 1903, relator was requested by the inspectors of election to draw lots for the office, the said inspectors having returned 218 votes cast for the defendant, and having declared the election to be a tie; that the relator refused to draw lots for the reason that he had been legally elected, and that thereupon a person was appointed by the inspectors to draw lots in his place, and that the defendant was declared elected; that the relator duly filed his oath of office and qualified as assessor on the 15th of April, and on the 16th of April made demand upon the defendant for said office, which was refused, and the said defendant still retains the same. The complaint further alleges that he petitioned the attorney general to bring this action, and that he refused, and demands judgment declaring that the defendant is not entitled to said office, and that he be ousted therefrom, and that the relator be admitted thereto. The defendant, by answer, alleged that the whole number of ballots counted by the inspectors for the office of assessor of the village was 436, of which the relator received 218, and the defendant 218, whereupon the inspectors of election ordered lots to be drawn for the office, upon which draw-

ing the defendant was duly declared elected to said office. The defendant further alleges that he received the greatest number of votes cast by duly qualified electors for the office, and was legally elected thereto, and duly qualified therefor, and is now legally holding the said office.

The action was tried before a jury, and a special verdict rendered as follows:

"(1) What was the total number of legal votes cast by the duly qualified electors of the village of West Allis at the village election holden on the 7th of April, 1903, for the office of assessor? A. (426) four hundred and twenty-six. (2) What was the total number of legal votes cast by the duly qualified electors of said village of West Allis at said election for the relator, *George M. Leonard,* for the office of assessor? A. (214) two hundred and fourteen. (3) What was the total number of legal votes cast by the duly qualified electors of said village of West Allis at said election for the respondent, *August Rosenthal,* for the office of assessor? A. (212) two hundred and twelve. (4) Were any illegal votes cast at said election for the office of assessor? A. (10) ten. (5) If you answer the preceding question in the affirmative, how many, if any, of such illegal votes were cast for the relator, *George M. Leonard?* A. (4) four. (6) If you answer the fourth question in the affirmative, how many, if any, of such illegal votes were cast for the respondent, *August Rosenthal?* A. (6) six."

Upon this verdict, judgment of ouster, with costs, was rendered in favor of the relator, and the defendant appeals.

For the appellant the cause was submitted on the brief of *Edgar L. Wood.*

H. L. Eaton, for the respondent.

WINSLOW, J. The appellant's contentions will be considered *seriatim:*

1. It is provided by sec. 3468, Stats. 1898, among other things, that in actions of this nature it shall be necessary for the relator to state in his complaint "the actual number of legal votes cast for the relator *and for the defendant.*" The

complaint before us does not state, either directly or by implication, the actual number of legal votes cast for the defendant. Where a statute imperatively requires a complaint to state a certain fact, such averment is essential to the cause of action. *M. E. Church v. N. P. R. Co.* 78 Wis. 131, 47 N. W. 190. The requirement above named was first incorporated in our law by ch. 127, Laws of 1869, hence the decisions prior to that statute (such as *State ex rel. Dickinson v. Brunner,* 20 Wis. 62), holding that it was not necessary to state in the complaint the number of votes given for each candidate, do not apply. The demurrer *ore tenus* to the complaint should therefore have been sustained.

2. There were a number of witnesses called by the relator who did not live in the village at the time of the election, but went into the village some weeks afterward, who testified that they then made systematic inquires at the various manufacturing establishments and boarding houses in the village, as well as of residents of the village, as to whether certain of the alleged illegal voters were known to reside in the village on election day. These witnesses were then allowed to testify, against objection and exception, that, from such investigation, they were not able to find that such parties resided in the village on the day of the election. That this evidence is strictly hearsay evidence cannot be successfully denied. Indeed, some of it was the second degree of hearsay, if such an expression may be coined, for the reason that it was based upon like investigations of other persons, who stated their results to the witnesses who were on the stand, who then gave them at second hand to the court. We recognize the great practical difficulty in proving the fact of nonresidence, but we have not been able to convince ourselves that this difficulty justifies so serious an infraction of the rule excluding hearsay evidence, nor are we referred to any authorities so holding. In *State ex rel. Hopkins v. Olin,* 23 Wis. 309, it was held that evidence by residents of the village that no such

persons as some whose names appeared on the poll list as having voted were known by them to have resided in the village is sufficient evidence to go to the jury upon the question whether such votes were illegally cast. It is said in McCrary on Elections (4th ed.) § 469, that witnesses are often called to testify that persons whose names appear on the poll list are not known to them to be residents of the voting precinct. "This kind of evidence is admissible for what it is worth, but it is manifest that its value must depend upon circumstances." The author further says, in substance, that if the voting district is large and populous, and the witness has not an intimate and extensive acquaintance with the inhabitants, such testimony will be of little value, but that if the district is not large or populous, and the witness has an intimate and extensive acquaintance with the inhabitants, his evidence may be quite satisfactory, especially if it appear that the alleged illegal voter could not be found in the district soon after the election. In *Todd v. Cass Co.* 31 Neb. 150, 47 N. W. 748, a still more restricted rule is laid down as to the requisites of this kind of proof, and we have found no case justifying the broad ruling of the court before us. While we do not think it is absolutely necessary that the witness should have actually resided in the election district at the time of the election, we think it is necessary that he should first show that he was at that time, to some substantial extent, acquainted with the inhabitants of the district, or some portion of them, and then he may testify that he knew no such person as a resident of the district.

3. Two of the alleged illegal votes were alleged in the complaint to have been cast by Frank Bierse and George Lang, respectively; and evidence was received, against objection, tending to show that two persons whose names appear on the poll list as Frank Bersche and George Long were nonresidents of the village, and these rulings are alleged as error. We think these names are sufficiently alike in sound to come under

the rule of *idem sonans,* and hence that there was no error. 21 Am. & Eng. Ency. of Law, 313, and notes.

4. A witness for the relator, named Tibbetts, after having testified to the making of extensive investigations after the election as to the residence of a number of the alleged illegal voters, in the course of which he went to La Crosse, was asked on cross-examination whether the relator did not pay him for his time, and also pay the expenses of his trip, or part of them; and objections to such questions were sustained. This ruling was plainly erroneous. It is always competent upon cross-examination to show the relations, intimate or otherwise, which exist between the witness and the parties to the action, as bearing upon his credibility. 3 Jones, Evidence, § 829.

5. A witness was allowed, against objection, to testify that he had made a search of the records in the offices of the clerks of the various courts of record of Milwaukee county, to ascertain whether Frank Bierse had ever been naturalized as a citizen, and had found no record of such naturalization. The only contention made is that the clerks themselves should have been produced, with their original records, or that certificates of the clerks to the fact that no such record could be found should have been introduced, under sec. 4163, Stats. 1898. The objection is not well taken. At common law the fact that a specific document or entry did not exist in public records might be proven by the testimony on the stand of any one who had made a search of the records for the purpose. This was not confined to the custodian, though the custodian was usually called. 3 Wigmore, Evidence, § 1678, subd. 5. The custodian could not make a certificate which would be admissible as evidence of the fact; hence the passage of sec. 4163.

6. A witness for the relator, after stating that he could not find certain of the alleged illegal voters as residents of the village, was allowed to state, against objection, that he did find persons answering to those names as residents of Milwau-

kee on the 15th of April. Upon cross-examination it appeared that he did not see any of such persons, except one, and that his testimony that they resided in Milwaukee was founded upon the fact that he found their names in a city directory of Milwaukee, the date of issue of which directory he was unable to state. We cannot think that such evidence is competent. The directory may have been issued years before the election, but, aside from this consideration, the fact that the directory of a large city like Milwaukee contains many names identical with names borne by residents of other places is well known. If nonresidence could be proven by this fact, then it would be easy to make a *prima facie* case of nonresidence against very many respectable citizens of towns, villages, and cities in all parts of the state, by simply showing that a similar name was to be found in a previously issued directory of the city of Milwaukee. We have no hesitation in holding that this evidence was inadmissible.

7. A number of witnesses for the relator were allowed to testify, against objection, that some time after the election they talked with persons bearing the same name as certain names appearing upon the poll list, and that these persons each stated that they voted at the election against the relator, and that they were not residents of the village at that time. Were the question of the admissibility of this testimony a new one in this court, we should be obliged to confess that it would admit of very serious doubt. There is much authority to the contrary, and upon quite persuasive reasoning. McCrary, Elections (4th ed.) §§ 484–486; *Gilleland v. Schuyler,* 9 Kan. 569; *Dean v. Miller,* 56 Neb. 301, 76 N. W. 555; *People ex rel. Dean v. Comm'rs,* 7 Colo. 190, 2 Pac. 912; *Kreitz v. Behrensmeyer,* 125 Ill. 141, 17 N. E. 232; *Lauer v. Estes,* 120 Cal. 652, 53 Pac. 262. The reasoning in these cases is that declarations made, accompanying the act of voting, may be properly admitted as a part of the *res gestæ* of the election, but that declarations made afterwards, not being

the statements of a party to the litigation, are strictly hearsay. The opposite view, however, is not without respectable authority, and it was expressly approved by the court in the case of *State ex rel. Hopkins v. Olin,* 23 Wis. 309, which case received approval on this point in *State ex rel. Bell v. Connoss,* 106 Wis. 425, 82 N. W. 288, though in the latter case exclusion of such testimony was upheld on the ground that the offer was not sufficiently definite as to the time and substance of such declaration. Whatever might be our ideas upon the question as an original proposition, we do not feel that we should now depart from the rule which has stood unchallenged in this state for more than thirty-five years, and which has doubtless beeen acted upon by parties and by trial courts many times since it was laid down. The reasons given for the ruling are that the person who has voted is considered a party to the controversy, and hence that his voluntary declarations are admissible.

8. The trial court charged the jury upon the subject of the burden of proof as follows:

"The burden of proof in this case as to all the material facts necessary to sustain the plaintiff's claim is upon the plaintiff. He must show or prove by competent evidence, so as to satisfy your minds by a preponderance of all the evidence, that such facts exist as alleged by him—that is, the plaintiff has the burden of proof as to such matters as he alleges—and, in order for you to answer the questions which will be submitted to you, as the plaintiff contends you should answer them, you must be satisfied by a preponderance of all the evidence that his contention is correct.

"The defendant has alleged, among other things, that he received the greatest number of votes cast by the duly qualified electors of said village for the office of assessor. The burden of proof in this action as to all the material facts necessary to sustain the defendant's allegations is upon the defendant. He must show or prove by competent evidence, so as to satisfy your minds by a preponderance of all the evidence, that such facts exist as alleged by him—that is, the de-

fendant has the burden of proof as to such matters, as he alleges—and, in order for you to answer the questions which will be submitted to you as the defendant contends you should answer them, you must be satisfied by a preponderance of all the evidence that his contention is correct."

"I further charge you, gentlemen of the jury, it is conceded that the defendant received a certificate of election as assessor, issued by the proper officers, in proper legal form; and the jury is instructed that said certificate is *prima facie* evidence of the defendant's right and title to said office, and his said right and title to said office can only be overcome by some positive testimony that illegal votes sufficient to change the result of said election were cast and counted for the defendant. But when it shows by satisfactory evidence that the certificate does not state the truth as to the result of such election, the presumption in favor of the incumbent, based upon such certificate, is rebutted, and then the burden is thrown upon the defendant to establish his right to the office by other competent evidence, to show that he has received an equal number or a greater number of legal votes than the plaintiff."

There is certainly confusion here, rather than helpfulness. The first portion of these instructions says, in effect, that the burden of proof is upon both parties at the same time. It was proven at the inception of the case that the defendant was declared elected by the board of canvassers of the election, and was holding the office under such determination. This created a presumption in his favor that he had received the number of votes stated in the certificate, and cast upon the relator the burden of showing that the certificate was false, thus rebutting the presumption. When this has been done by competent evidence, it then devolves upon the defendant to establish his right (i. e., the fact that he received the greater number of votes) by other evidence, in order to prevent a judgment of ouster. *State ex rel. Swenson v. Norton,* 46 Wis. 332, 1 N. W. 22. These rules should have been given to the jury.

It is not perceived why it was deemed necessary to submit so many questions to the jury, in making up the special ver-

dict. Two questions would determine the case, viz., how many legal votes were cast for the relator, and how many legal votes were cast for the defendant.

While all the errors assigned have not been specifically discussed, it is believed that the principles stated fully cover the claims of error made.

By the Court.—Judgment reversed and action remanded for a new trial.

KOERBER, Appellant, vs. PATEK, Respondent.

November 16, 1904—January 10, 1905.

Dead bodies: Mutilation: Cause of action: Compensatory damages: Injuries to feelings: Who may maintain action: Pleading: Demurrer.

A complaint alleged that plaintiff was the son and heir of his mother, who died in a hospital; that he was by her, before her death, instructed and requested to take charge of her body for purposes of burial, and was the only person interested; that he did so, removing the body to his place of residence, and proceeding to have the same prepared for burial; that defendant requested permission to merely examine the stomach of said body, which request being granted, he wilfully, maliciously and fraudulently, without authority, and against the wish of plaintiff, and without any authority at law, and trespassing upon the rights of the plaintiff as custodian of said body and as son and heir, cut out, removed, and carried away the stomach of said dead body, whereby burial became necessary without it, and that thereby the rights of the plaintiff had been recklessly and wilfully trespassed upon, and his feelings greatly injured, so that he has suffered both in mind and body, to his damage, etc. Defendant demurred to the complaint for defect of parties, and failure to state facts sufficient to constitute a cause of action. *Held:*

(1) The complaint stated a clear legal right, and an unlawful and wilful violation thereof, from which the law implied at least nominal damages, for which, upon fundamental principles of the common law, a right of action existed.

(2) The sense of outrage and the mental suffering to plaintiff, resulting directly from the wilful act charged upon the defendant, were proper independent elements of compensatory damages.

(3) The allegations that plaintiff was the son of the deceased (obviously adult), and that he was the only person having any interest, are sufficient on demurrer to exclude the existence of any surviving husband, or any other child having equal right or duty to supply proper burial to his mother's remains, and that the right of custody and burial, and the resulting right of action for violation thereof, were in the plaintiff.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Appeal from order sustaining demurrer to complaint, which alleged that the plaintiff was the son and heir of his mother, who died in hospital in Milwaukee, and was by her, before her death, instructed and requested to take charge of her body for purposes of burial, and was the only person interested; that he did so, removing the body to his residence, and proceeding to have the same prepared for burial; that the defendant requested permission to merely examine the stomach of said body, which request being granted, he wilfully, maliciously, fraudulently, without authority, and against the wish of the plaintiff, and without any authority at law, and trespassing upon the rights of the plaintiff as custodian of said body and as son and heir, cut out, removed, and carried away the stomach of said dead body, and refused to return the same on request, whereby burial became necessary without it; that thereby the rights of the plaintiff have been recklessly and willfully trespassed upon, and his feelings greatly injured, so that he has suffered both in mind and body, to his damage $5,000.

Chas. G. Woolcock, for the appellant.

Edwin S. Mack, for the respondent, contended, *inter alia,* that the canon law merely prevented sacrilege. The common law vests the right of burial in the public to be exercised for the benefit of the deceased. No individual can possibly have

any right to a corpse. The ecclesiastical courts acted to prevent sacrilege and had no power to award any damages. 3 Reeves' History Eng. Law (Finlayson's ed.) 70, 71; 2 Bacon's Abridg. tit. COURTS ECCLES. D. 489; 2 Inst. 493; 3 Bl. Comm. ch. 6; Tyler's Am. Eccles. Law, sec. 94; 2 Burn's Eccles. Law, 51, tit. COURTS, sec. 15; Baker's Law of Burials, 8–16. The common law recognizes no rights of any individual in a corpse. The right to require proper burial belongs to the public to be exercised for the benefit of the deceased. 2 Bl. Comm. 429; Cooley, Torts (2d ed.) 281; 3 Inst. 203; 2 East, P. C. 652; *Foster v. Dodd,* L. R. 3 Q. B. 67; *Regina v. Sharpe,* 7 Cox C. C. 214; *Williams v. Williams,* L. R. 20 Ch. D. 659; *In re Brick Presb. Church,* 3 Edw. Ch. 155, 168; *Secord v. Secor,* 18 Abb. N. C. 78; *Guthrie v. Weaver,* 1 Mo. App. 136; *In re Wong Yung Quy,* 6 Sawy. 442–449. There is however at common law a duty on the part of the relatives of a deceased person to give him proper burial. Such burial is in no sense a right of the living, but rather a right of the dead, and the duty is one that is due to the community. It was not the ecclesiastical courts but the common law courts that protected and enforced this right of burial. The method of enforcement shows conclusively that no right ever existed in any individual, and that the duty of burial is owing only to the public. This public duty of burial was enforced like any other public duty, namely by criminal prosecution for failure to perform the duty and by *mandamus* to compel its performance. The duty of burial devolves even on the person in whose house the death occurs. *Queen v. Stewart,* 12 Adol. & El. 773, 40 Eng. Com. Law, 192; *Foster v. Dodd,* L. R. 3 Q. B. 68; *Queen v. Fox,* 2 Q. B. 246, 42 Eng. Com. Law, 658; *Handyside's Case,* 2 East P. C. 652; *Guthrie v. Weaver,* 1 Mo. App. 136; *Keyes v. Konkel,* 119 Mich. 550, 44 L. R. A. 242; *Regina v. Sharpe,* 7 Cox C. C. 214. The relatives of a deceased person may control the disposition of the dead body, and equity gives a remedy for the

recognize and protect; hence that the expense of the removal and suitable reinterment of the bodies in that cemetery was properly recoverable in favor of the relatives. At about the same time the supreme court of Indiana announced the doctrine that bodies of the dead "belong to the surviving relatives, in the order of inheritance as property." *Bogert v. Indianapolis,* 13 Ind. 134. In 1872 the supreme court of Rhode Island was confronted by a controversy between the only child and heir and the widow of a decedent as to the right of the latter to remove the body from its place of original interment to another lot. The court reviews historically the rights of relatives over the burial of their dead under several systems of law, including that of England while pervaded by the doctrine of ecclesiastical control, and said:

"That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation. It may therefore be considered as a sort of *quasi*-property, and it would be discreditable to any system of law not to provide a remedy in such a case." "And a sort of right of custody over, or interest in, the dead body, in the relatives of the deceased, is recognized in the statutes of many of our states." "We may consider it [the body] as a sort of *quasi*-property, to which certain persons may have rights, as they have duties to perform arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever. He holds it only as a sacred trust for the benefit of all who may, from family or friendship, have an interest in it."

From these views the court deduced the conclusion that a court of equity might control the exercise of those rights by one relative, with due regard to the interests of others or of the public, in suggested analogy to control over the custody

of children by their parents. It was accordingly held, without deciding as to the relative rights of control as between the widow and the children over the original interment, that under the circumstances the widow ought not to remove a body already buried. Since these early cases the questions of the existence of such a right, and of the person in whom it is vested, under varying circumstances, have been discussed under many phases in different states. A partial list of such cases is as follows: *Foley v. Phelps,* 1 App. Div. 551, 37 N. Y. Supp. 471; *Secord v. Secor,* 18 Abb. N. C. 78; *Snyder v. Snyder,* 60 How. Pr. 368; *Patterson v. Patterson,* 59 N. Y. 583; *Johnston v. Marinus,* 18 Abb. N. C. 72; *In re Richardson,* 60 N. Y. Supp. 539; *Griffith v. C., C. & A. R. Co.* 23 S. C. 27; *Farley v. Carson,* 5 Wkly. Law Bul. 786; *Hadsell v. Hadsell,* 7 Ohio Cir. Ct. 196; *Renihan v. Wright,* 125 Ind. 536, 25 N. E. 822; *Wright v. Hollywood C. Corp.* 112 Ga. 884, 38 S. E. 94; *Durell v. Hayward,* 9 Gray, 248; *Meagher v. Driscoll,* 99 Mass. 281; *Weld v. Walker,* 130 Mass. 422; *Burney v. Children's Hospital,* 169 Mass. 57, 47 N. E. 401; *Hackett v. Hackett,* 18 R. I. 155, 26 Atl. 42; *Larson v. Chase,* 47 Minn. 307, 50 N. W. 238; *Young v. College,* 81 Md. 358, 32 Atl. 177; *Wynkoop v. Wynkoop,* 42 Pa. St. 293; *Anonymous Case,* Ohio C. C. 1871, 6 Am. Law Rev. 182; *Pettigrew v. Pettigrew,* 207 Pa. St. 313, 56 Atl. 878; *McEntee v. Bonacum,* 66 Neb. 651, 92 N. W. 633; *Palenzke v. Bruning,* 98 Ill. App. 644; *Enos v. Snyder,* 131 Cal. 68, 63 Pac. 170; *Hockenhammer v. L. & E. R. Co.* (Ky.) 74 S. W. 222.

1. For the purposes of this case we shall not deem it necessary to consider whether a corpse can be, in any respect, property. From the authorities above cited, and from original reason, the conclusion seems to us irresistible that in the nearest relative of one dying, so situated as to be able and willing to perform the duty of ceremonious burial, there vests the right to perform it, and that this is a legal right, which,

as said in some of the cases, it is a wrong to violate, and which, therefore, courts can and should protect and vindicate. It is not alone with reference to property that legal rights exist, nor is it only those invasions of legal rights causing tangible pecuniary injury for which courts will entertain civil actions and award damages. It is difficult to discover any money loss necessarily resulting from an assault without physical contact; an obstruction of the right to vote; expulsion from car without physical contact or injury; malicious prosecution; the secreting or even the seduction of a daughter; the mere alienation of a wife's affections, affecting only the sentimental relations. Yet courts find no difficulty in entertaining such actions and awarding compensatory damages. In such cases the clear legal right of exemption from such wrongful acts is itself the property. An injury to such a right need not include either an injury to physical property nor to person or character. *Gibbs v. Larrabee,* 23 Wis. 496; *Wagner v. Lathers,* 26 Wis. 436; *Wightman v. Devere,* 33 Wis. 570. The wrongful invasion of a clear right is of itself sufficient to support an action, and the law presumes damages, though they may be only nominal. *Larson v. Chase, supra; Pierce v. Proprietors,* 10 R. I. 227; *Luessen v. Oshkosh E. L. & P. Co.* 109 Wis. 94, 98, 85 N. W. 124; *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249; *Luby v. Bennett,* 111 Wis. 613, 87 N. W. 804.

True, there are instances of invasion of a clear legal right where the common law has denied any action, out of considerations of public policy or impracticability of accomplishing justice; and there are other instances where the common law, when transplanted across the Atlantic, had not been declared. The question presented in *Duffies v. Duffies,* 76 Wis. 374, 45 N. W. 522, is an excellent illustration of the latter class. In England any action by the wife for alienation of the husband's affections had been denied on the ground that she had

no legal right to his *consortium*—her legal identity being merged in him—and also on the ground that the maintenance of such action was impracticable, since it must be brought by him, and damages would belong to him. This court, adopting the former ground, held that she had no legal right which had been invaded, and hence no action, although the practical difficulties arising from common-law disability to sue alone had been removed. Had this court, as did some others, reached an opposite conclusion as to the existence of a legal right, silence of English courts as to existence of such an action would not have stood in the way of maintaining it. The present case also presents one of the latter class, for English courts had never, so far as discoverable, affirmed or denied existence of such a right of action. This silence is easily accounted for by the dominance of the church both over the right of custody and burial of the dead, and, through its ecclesiastical courts, over enforcement or vindication of such rights. Where, during the ages of development and enforcement of the common law, no right of action has ever been recognized as arising upon a given state of facts, there is good reason to doubt the existence of any such right upon common-law principles, and courts should examine and re-examine anxiously their reasoning before resolving that doubt in favor of the action. When, however, after all care has been exercised, the conclusion is irresistible that the principles of the common law require recognition of such a right of action, it is as much the duty of courts to sustain it the first time as on subsequent occasions. All precedents necessarily have a beginning. *"Boni judicis est ampliare justitiam."* *Rex v. Philips,* 1 Burrows, 304; Broom's Leg. Max. 79; *Pierce v. Proprietors, supra.* While, therefore, the silence of the courts of England during the formative period of that common law which came to America with our ancestors has given us pause, and has caused, if not justified, the scope of investigation and

discussion in this case, that silence alone is no insuperable obstacle to a conclusion in favor of the existence of such rights.

Turning for aid to the decisions of the courts of other states, we find that the question now before us has been several times considered, and that those courts have, with striking unanimity, declared in favor of the maintenance of such an action as this. *Larson v. Chase,* 47 Minn. 307, 50 N. W. 238; *Foley v. Phelps,* 1 App. Div. 551, 37 N. Y. Supp. 471; *Anonymous Case in Ohio,* 6 Am. Law Rev. 182; *Farley v. Carson* (Ohio Dist. Ct. 1880) 5 Wkly. Law Bul. 786; *Burney v. Children's Hospital,* 169 Mass. 57, 47 N. E. 401; *Wright v. Hollywood C. Corp.* 112 Ga. 884, 38 S. E. 94; *Palenzke v. Bruning,* 98 Ill. App. 644. The later American text-writers recognize such a right of action to be now established upon the authority of these decisions. 1 Sutherland, Dam. § 95, p. 278; 1 Jaggard, Torts, 13; 2 Kinkead, Torts, § 463; 2 Joyce, Dam. § 1048; Perley, Mortuary Law, 28; 8 Am. & Eng. Ency. of Law (2d ed.) 835. The first two, and especially the first of these cases may be considered leading, as they have been cited as the basis for most of the later ones upon this immediate subject, and in many others approaching it. True, some of the decisions cited were not by courts of last resort, but they were emitted from reviewing courts of much respectability sitting *en banc,* and after full argument. In the Minnesota case the real basis of the decision is put by MITCHELL, J., in a paragraph as follows:

"But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary, commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and pro-

tected by the common law will, if the direct and proximate consequences of an actionable wrong, be subject for compensation."

We confess our inability to escape, if we would, this logic. We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency; certainly none where the law need less hesitate to impose upon a wilful violator responsibility for the uttermost consequences of his act. We recognize, of course, that public welfare may and does require governmental control in many respects for protection of life and health of the people, and for discovery of crime connected with the death of a person, and to such interests the private right is subservient so far as necessary. Upon this ground rest cases of autopsies upon dead bodies under public authority, and to satisfy police regulations for ascertainment of cause of death. *Young v. College,* 81 Md. 358, 32 Atl. 177; *Cook v. Walley,* 1 Colo. App. 163, 27 Pac. 950; *Palmer v. Broder,* 78 Wis. 483, 47 N. W. 744. Even such authority must be exercised lawfully and reasonably. *Palenzke v. Bruning,* 98 Ill. App. 644. This complaint, however, suggests no such justification. Also we recognize the difficulties in the way of sustaining any action for mere negligence resulting in no pecuniary damage. *Griffith v. C., C. & A. R. Co.* 23 S. C. 27; *Hockenhammer v. L. & E. R. Co.* (Ky.) 74 S. W. 222. In such case the injury to feelings of survivors not being legal damage, at least in Wisconsin, no recoverable damage results from mere negligence in such cases. That situation, however, is not here presented, for the defendant's act is alleged to have been wilful. We are convinced that the complaint asserts a clear legal right—whether in the plaintiff, we shall consider later; also an unlawful and wilful violation of that right, from which the law implies at least nom-

inal damages, for which, upon fundamental principles of the common law, a right of action should exist.

2. The question whether anything more than nominal damages can be recovered has been earnestly argued by counsel, and is only second in importance to that of the existence of any cause of action at all, for, obviously, in cases of this character, any pecuniary loss to plaintiff must usually be merely trifling. The great injury done consists in the outrage upon the sensibilities. Can such injury be considered as legal damage, otherwise than by way of imposing punitory damages in case of actual malice? It is settled in this as in most jurisdictions that mental suffering may be an actual injury, for which award is to be made strictly as compensation in proper cases. *Wilson v. Young,* 31 Wis. 574; *Gatzow v. Buening,* 106 Wis. 1, 19, 81 N. W. 1003. Such injury, however, clearly existent, has been held not a proper element of recoverable damages in actions on contract, except breach of promise of marriage. *Walsh v. C., M. & St. P. R. Co.* 42 Wis. 23; *Giese v. Schultz,* 53 Wis. 462, 10 N. W. 598. Nor in actions of mere negligence, unless, as a proximate result of the negligence, there be physical injury from which flows the mental suffering. *Summerfield v. W. U. Tel. Co.* 87 Wis. 1, 57 N. W. 973. In these respects we differ from a few courts which have adopted what is known as the "Texas doctrine," applied originally to failure to deliver telegrams, but since to other phases of both negligence and breach of contract causing mental anguish. In Indiana it has been invoked to support such damages resulting from breach of contract to prepare and preserve a corpse for burial. *Renihan v. Wright,* 125 Ind. 536, 25 N. E. 822. That doctrine, with its supporting authorities, was reviewed fully in the *Summerfield Case,* and repudiated. The only other tort action in Wisconsin where mental suffering was denied as an element of compensatory damages is *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003, which was for a conspiracy to induce the

breaking of a contract to supply a hearse for a funeral; the contract being broken, and, as a result, the funeral interrupted. In many other tort actions mental distress has been held a proper independent element of damage, though in no wise resulting from a physical injury, but directly from the wrongful act—from the outrage of some legal right. Only a few such need be cited. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Fenelon v. Butts,* 53 Wis. 344, 10 N. W. 501; *Stutz v. C. & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653; *Grace v. Dempsey,* 75 Wis. 313, 43 N. W. 1127; *Pellardis v. Journal P. Co.* 99 Wis. 156, 74 N. W. 99; *Ford v. Schliessman,* 107 Wis. 479, 83 N. W. 761. It is thus apparent that some torts do and some do not subject the perpetrator to liability to compensate the anguish and suffering which his wrongful act imposes upon the victim. Probably the line between them is not so accurately drawn that the location of every act on the one side or the other is always easy or free from doubt. It is obvious that in mere negligence there is no intent to offer indignity to, or wound the feelings of, another; and it may be legitimately said, as matter of law, that such result from mere inadvertence is so remote and beyond ordinary probabilities that there exists no proximate causal relation between the two, unless a physical injury is caused, out of which, in natural sequence, arises mental, like physical, pain. In *Summerfield v. W. U. Tel. Co. supra,* this court, by the pen of Mr. Justice WINSLOW, quoted approvingly from *Western U. Tel. Co. v. Rogers,* 68 Miss. 748, 9 South. 823, a classification of the torts other than negligence supporting recovery of mental suffering as an independent element, as follows: "Cases of wilful wrong—especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." In *Gatzow v. Buening, supra,* it was said that the wrong there complained of, already described, did not fall within the above category. This was quite obviously true of the particular tort, towit, the conspiracy to prevent

the making or performance of a contract to supply a hearse for a funeral. In that there could be no intent to wound the feelings of plaintiff—he was not in the mind of the conspirators; and, if some such result was to be anticipated as possible, it would be quite as remote as from the mere act of breaking the contract. Such damage would be not the direct result of the conspiracy, but remote and consequential, like the disappointment resulting from breach of a promise to supply on time a wedding present or funeral flowers. The proximate casual relation between the conspiracy and the mental effect was lacking. Counsel seem to read that case as if it were one against Buening alone for his violence and force in physically preventing plaintiff from using the hearse, in abusive and turbulent manner, evincive of an intent to insult and outrage his feelings. Had that been the act complained of, we could hardly have said that it did not fall within the classification approved in the *Summerfield Case,* including willful wrongs affecting the "liberty," "security," or "domestic relations." In *Ford v. Schliessman, supra,* it was pointed out that an assault or technical imprisonment, though without physical contact, falls within the classification of the *Summerfield Case,* because "it invades the personal liberty and rights." Again, in *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249, in discussing the contention that there could be no recovery for injury to feelings in absence of other actual damage, it was said:

"The rule for which appellant contends has been applied only to cases of negligence or of alleged personal injury, where the mental suffering can result only from the injury, and not from the tort. It has never been applied to cases of malice, such as false imprisonment and slander."

In *Larson v. Chase,* 47 Minn. 307, 50 N. W. 238, the remarks of MITCHELL, J., on this subject, are so philosophical that we cannot forbear quoting them. He says:

"Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We

think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering; placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. . . . But where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is direct, proximate, and natural result of the wrongful act."

In *Lombard v. Lennox,* 155 Mass. 70, 28 N. E. 1125, it is said:

"If the ordinary and natural consequence of the tort is to cause an injury to the feelings of the plaintiff, and if the acts are done willfully or with gross carelessness of the right of plaintiff, damages may be recovered for mental suffering."

Similar views are expressed by text-writers. 1 Sedgwick, Dam. (8th ed.) §§ 43 to 47; 1 Sutherland, Dam. § 95 *et seq.;* 2 Kinkead, Torts, § 463.

These expressions from other courts are perhaps useful as indicating the philosophy involved in distinguishing between those torts which may and those which cannot be deemed to so proximately cause sense of outrage and mental suffering that the law will recognize such effect as an independent element of recoverable damage, whether resulting merely from some other injury, or directly from the tort itself; but they do not, in our judgment, vary or enlarge the field charted and delimited in the *Summerfield Case,* as above quoted. For the present case we are convinced that sufficient guide can be found in the catalogue there promulgated. Certainly this complaint asserts a "willful wrong," not only in the sense that some injury to plaintiff's legal rights was intended, but also

that an affront to his feelings was so certain to be caused by the defendant's act that the latter must be deemed to have intended that particular injury. We also think that, without undue stretch of meaning, the wrong complained of affects the "domestic relations"—otherwise called the relative rights—of plaintiff. The duty of surviving spouse, parent, or child to provide proper burial for the corpse springs from the relationship to the person deceased. The desire to perform such service is founded in that respect and affection entertained for the relative, of whom the body, it is true, is but the symbol, but, for the few hours after life ceases, seems so to still represent him who was, that acts of care and protection to it are still paid to such departed. Mr. Kinkead says, "The family tie takes us to the last resting place of our dead" (2 Torts, § 459), and therefore classes torts of the kind here presented as committed against the relative rights growing out of the domestic relations, like seduction or abduction of wife or child. Mr. Cooley likewise so classifies them. Torts (2d ed.) p. 280. Recognition that duties arising in the domestic relation persist beyond death is not wanting in the law. Upon that idea is predicated the liability of the surviving husband for burial expenses incurred by a stranger for the body of his deceased wife, in strict analogy to necessaries furnished her in life. *Bradshaw v. Beard,* 12 C. B. (N. S.) 344; *Cunningham v. Reardon,* 98 Mass. 538; *Patterson v. Patterson,* 59 N. Y. 583; *Kenyon v. Brightwell* (Ga.) 48 S. E. 124; Bishop, Marriage, Divorce & Sep. § 1258. Statutes providing temporary support out of an estate for widow and minor children unquestionably find their reason in the same conception. Doubtless other illustrations might be suggested, but these suffice to satisfy us that there is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation,

and that a wilful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as an independent element. Apart from this view, however, we should deem it indisputable that the tort alleged is one "affecting the liberty" of plaintiff. The right to entomb the remains of his deceased mother in their integrity and without mutilation, we have already decided, must be recognized as a legal one. The liberty of a member of a community governed by law is not merely freedom from actual imprisonment, but from obstruction of or interference with those acts which it is his right to do at will. *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098. An illustration is the right to vote, mentioned in some of the above-cited cases, with which the right alleged to have been invaded in this case seems to stand in complete analogy. We therefore conclude that the sense of outrage and the mental suffering resulting directly from the wilful act charged on the defendant in this case are proper independent elements of compensatory damages.

3. The remaining question is whether the right of custody and burial, and resulting right of action for violation thereof, are in the plaintiff. As a result of the decisions and discussions above cited, it cannot be doubted that in the United States, where no ecclesiastical establishment, as a part of the government, equipped with executive and judicial powers as weapons, assumes to itself all authority and right over the dead body before burial, and over both the body and its place of sepulture afterwards, there exists in some individual both the duty and the right to provide to a human body that disposition which general welfare requires, with such ceremonies as convention, respect, and religion dictate. While in the case of one who died remote from those of closer affinity the mere relationship of contact may suffice to arouse such duty in absence of statutes giving charge to some public officer, in normal conditions of human relationship common consent and

bring this action, for the complaint alleges that he is the son of the deceased, obviously adult, and that he is the only person having any interest. On demurrer, this is sufficient to exclude existence of any surviving husband or any other child having equal or greater right or duty to supply proper burial to his mother's remains. If others exist whose rights would suffer invasion by such acts as are charged against defendant, so that they would have action therefor, that fact can be set up by defendant, and the necessity or propriety of their joinder be then considered.

The foregoing discussion, protracted perhaps unduly in deference to the novelty of the question in Wisconsin, and to the earnestness of counsels' argument, leads to the final conclusion that the complaint states a good cause of action in favor of the plaintiff, and that the trial court erred in sustaining the demurrer.

By the Court.—Order reversed, and cause remanded with directions to overrule the demurrer.

GILBERT PAPER COMPANY, Respondent, vs. WHITING PAPER COMPANY and others, imp., Appellants: FRITZ, Garnishee.

November 17, 1904—January 10, 1905.

Garnishment: Assignment in trust for creditors: Statutes: Right of general creditor to garnish trustee for creditor.

A corporation, being indebted to a large number of persons, delivered to F., who happened to be its secretary, its check for $5,000, accompanied by a communication addressed to F., as follows: "Pursuant to authority duly conferred by the board of stockholders, as well as the board of directors, there is hereby assigned to you in trust for the several parties and creditors mentioned in the annexed schedule, the aggregate sum of $5,000, to be distributed and paid forthwith to the

several parties named in detail statement." There was annexed a list of creditors, specifying against each the amount of his entire debt, and the amount to be paid to him out of the $5,000. F. deposited the money in his own bank account, and drew checks payable to each creditor named for their respective amounts. Most of the creditors accepted their checks, others notified F. that they would accept and others made no response. Plaintiff, who was one of the creditors named in the list, and who had not received its dividend, commenced action against the corporation, and garnished F. Sec. 1694, Stats. 1898, provides that all voluntary assignments for the benefit of or in trust for creditors shall be void unless accompanied by the various formalities therein prescribed (which were wholly absent from the above transaction), and sec. 2, ch. 334, Laws of 1897 (incorporated in said sec. 1694), provides that no creditor shall in any case, where a debtor has made or attempted to make an assignment for the benefit of creditors, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void. *Held*, that upon no theory as to the relations arising from the transfer of said $5,000 to F., was the money subject to garnishment.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

On June 6, 1902, the Milwaukee Lithographing & Engraving Company, principal defendant, being indebted to a large number of persons—but whether solvent or insolvent, the record is silent—delivered to the garnishee, Fritz, its check for $5,000, accompanied by the following communication:

"Milwaukee, Wis., 6|20|02.

"*Oscar M. Fritz, Esq., Milwaukee, Wis.*—

"Dear Sir: Pursuant to authority duly conferred by the board of stockholders, as well as the board of directors, there is hereby assigned to you in trust for the several parties and creditors mentioned in the annexed schedule, the aggregate sum of five thousand dollars ($5,000), to be distributed and paid forthwith to the several parties named in detail stated, by order of the board of directors.

"Yours truly,

"MILWAUKEE LITHOGRAPHING & ENGRAVING CO.

"By Fred Brosius, Prest."

Annexed was a list of creditors, specifying against each the amount of his entire debt, and the amount to be paid him out of that $5,000, which in each case was about fifteen per cent. of the total debt. Fritz, who was secretary of the corporation, but did not receive the money in that capacity, deposited it in his own bank account, and drew checks payable to each of the creditors for their respective amounts, which he retained in his possession, but about June 21st sent to each a notice that there stood to his credit, as a creditor of the lithographing company a percentage on his claim of —— dollars, which might be had by calling on Fritz. Most of the creditors called, and received their checks to the amount of about $4,800; and certain other creditors, after learning that receipt in full would not be required of them, notified Fritz that they would accept, but had not received their checks, while others had made no response at all up to July 8, 1902, when plaintiff, who was one of the creditors named in the list, and had not received its dividend, commenced suit against the lithographing company, and garnished Fritz, who answered, stating the facts above narrated, and that the several other creditors named claimed the respective amounts specified in said schedule. Upon order of interpleader, service was made upon all of the unpaid creditors, and the appellants interposed answers claiming ownership of their respective dividends. Creditors whose dividends aggregated about $150 did not appear. The court adjudged the money in Fritz' hands to belong to the lithographing company, and held him liable as garnishee to the plaintiff for the whole amount thereof, except $100 for expenses incurred by him; such balance being apparently less than the amount of plaintiff's judgment. It, however, also adjudged recovery of any surplus in favor of one Fick, a subsequent garnishing creditor. From this judgment the several interpleaded creditors appeal.

For the appellants there was a brief by *Carroll & Carroll*,

A. J. Eimermann, and *C. T. Hickox,* and oral argument by *Mr. Hickox* and *Mr. Eimermann.*

J. C. Kerwin, for the respondent.

DODGE, J. The first question which presents itself is whether the money placed in Fritz's hands, accompanied by the writing set forth in the statement of facts, remained the money of the principal defendant, subject to its control, direction, and recall, or whether it was so transferred to Fritz as an individual, distinct from the corporation, to hold for the benefit of the persons named as recipients, that they acquired rights therein as against him. This subject is considerably confused in respondent's brief by the citation of numerous authorities declaring the right of revocation and recall to exist in the grantor of a fund or of property placed in the hands of another upon his agreement to do something for the benefit of third persons, until such third persons have accepted. Indeed he cites numerous cases requiring complete novation before a right of action arises against the new promisor. These authorities give but little aid in solving the question, for the nonsignificance of an acceptance by one for whose benefit a contract is made between two others may be considered fully settled in Wisconsin by the case of *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440. Prior to that case there had been variant, if not conflicting, language in the decisions of this court as to the necessity of such an assent by the third person to a contract made for his benefit, in order to preclude the donor from revocation, and probably upon no subject are both the declarations and holdings of other courts more in conflict. The rule of that case has since been followed in *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 221, 94 N.W. 74; *Peterson v. C. & N. W. R. Co.* 119 Wis. 197, 204, 96 N. W. 532.

Of course, if this money did not pass out of the corporation,

but was simply deposited with Fritz as one of its officers and agents, to be handled according to the direction of his principal, there could be little doubt that any direction given was revocable until fully acted on. But we think the writing itself precludes this idea. The moneys were severed from the other moneys of the corporation. They were by that writing *assigned in trust,* and were reduced to the same kind of possession as were all other moneys belonging to Fritz in his own right. We cannot doubt that the intention of the transaction was to put this $5,000 out of the possession, custody, and control of the corporation, and that the fact that Fritz happened to be secretary of the corporation is in no wise significant. The money was assigned to him, not deposited with him. After he collected the corporation's check and deposited the money with his own bank, only he, and not the corporation, could demand it from the bank. We deem it plain that the title to the money became vested in him, and his obligations became such as resulted from the contract he made with reference thereto.

Having reached the conclusion that the specific $5,000 in question had ceased to be the property of the principal defendant, but had become that of Mr. Fritz, accepted by him upon the terms expressed in the letter accompanying it, we are then confronted with the inquiry how far general creditors of the depositaries can reach it. In this connection there is a general rule that a creditor can maintain garnishment only where the principal debtor could maintain an action for the recovery of the money or property. This general rule is modified in favor of creditors when the money or property is held upon such trusts as constitute a fraud on creditors, or to be void as against them. On the one hand it is argued that by the acceptance of $5,000, accompanied by this writing, Fritz agreed, by clearest implication, to pay these several sums, respectively, to the persons named in the writing, and that the receipt of this sum of money is a valid and complete

consideration for such promise, and that thereby arose the exact situation dealt with in *Tweeddale v. Tweeddale, supra,* where one, for a valid consideration moving from another, agrees to pay money to a third person, in which it is held that the last may, at his election, bring his action to enforce such promise, and that in the interval the transaction is so consummated in favor of the beneficiary that the original grantor of the property, or payor of the consideration, has no power of revocation. Clearly, if that were the situation, and it were free from fraud, no general creditor could maintain garnishment, for the person receiving the money or property and making the promise would neither be indebted to, nor hold any property of, such principal debtor.

It is however, urged with much vigor that this instrument declares in express terms a trust, of which the several persons named in the writing are beneficiaries, and that they would have no right of action at law against Mr. Fritz, but must proceed in equity as for the enforcement of a trust. Whether this be so, where the only duty to be performed by a so-called trustee is payment of specific sums of money, is questioned, as also whether, even if suit must be in equity, that would constitute any valid distinction from the principle of the *Tweeddale Case.* We need not undertake to resolve such questions, however, for, if this be a trust for the several creditors named, the situation is controlled by the statute. It is now well settled that any transfer of property to a trustee upon a trust to distribute to creditors is an assignment for benefit of creditors, as that term is used in sec. 1694, Stats. 1898, and is, by that statute rendered void unless accompanied by the various formalities prescribed, which are wholly absent in the present transaction. *Winner v. Hoyt,* 66 Wis. 227, 28 N. W. 380; *Cribb v. Hibbard, S. B. & Co.* 77 Wis. 199, 209, 46 N. W. 168; *Bugbee v. Lombard,* 94 Wis. 326, 68 N. W. 958; *Dahlman v. Greenwood,* 99 Wis. 163, 74 N. W. 215; *Sweet, D. & Co. v. Neff,* 102 Wis. 485,

78 N. W. 745; *Kickbusch v. Corwith,* 108 Wis. 634, 648, 85 N. W. 148.

The present situation presents all the elements distinguishing an assignment for creditors under those decisions, if, as is suggested above, it is not a mere contract to pay specific sums to specified persons. Excluding that view, then we have a trustee, a trust with reference to property transferred by the debtor, and creditors as *cestuis que trustent.* The same authorities also established the proposition that such assignment being void, the assigned property continued to belong to the assignor, at least so far as his creditors were concerned, and could be reached by attachment or garnishment. The trial court seemed to consider the rule of these cases obscured by *Greene & B. Co. v. Remington,* 72 Wis. 648, 39 N. W. 767, 40 N. W. 643, but needlessly, for that case presented neither trust nor trustee—merely a promise to pay certain sums to specific persons out of the agreed purchase price of property conveyed absolutely; a situation in no wise legally distinguishable from that considered in *Tweeddale v. Tweeddale,* which must be considered to overrule anything said or decided in the former case inconsistent with it. The rule of the above-cited void assignment for creditors cases would, of course, sustain the garnishment here, but for new legislation prohibiting such procedure. After the decision of most of those cases the legislature enacted:

"No creditor shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of insolvency of any debtor, by attachment, garnishment or otherwise obtain priority over other creditors upon such assignment being for any reason adjudged void." Sec. 2, ch. 334, Laws of 1897.

We can entertain no doubt that this legislation was aimed directly at the rule laid down in *Winner v. Hoyt, supra,* and following cases, that property attempted to be conveyed by a void voluntary assignment could be seized by any individual creditor by attachment or garnishment. Indeed, its words

are too plain to invite or permit attempt to construe it upon that subject. We can but enforce it. We are aware that in *Duryea v. Muse,* 117 Wis. 399, 94 N. W. 365, subsequent to 1897, a garnishment was sustained against the assignee under a void voluntary assignment upon authority of the earlier cases. The court did not, in its opinion, at all discuss or consider the force of this legislation of 1897. It did not expressly deny it effect. If, however, it did so by implication, in sustaining the garnishment notwithstanding such statute existed and was called to our attention in the briefs, that implied denial must be deemed overruled.

The conclusion results that upon no theory as to the relations arising from the transfer of this sum of money which can be deduced from the writing defining those relations can the money be subject to garnishment.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the garnishee actions, and to order return to the garnishee, defendant Oscar M. Fritz, of the money by him deposited in court.

KERWIN, J., took no part.

LIGHTFOOT, Appellant, vs. WINNEBAGO TRACTION COMPANY, Respondent.

November 17, 1904—January 10, 1905.

Street railways: Personal injuries: Evidence: Competency: Remarks of trial judge: Appeal and error: Exceptions: Negligence: Proximate cause: Contributory negligence: Instructions to jury: Agency: Imputed negligence.

1. In an action against a street railway company for personal injuries it appeared, among other things, that plaintiff, who was riding in a vehicle with a driver behind a wagon loaded with wood, turned onto defendant's tracks, when a collision took

place with one of its cars, whereby plaintiff was injured. The owner of the wood wagon and the driver of the team were both unknown to plaintiff or her companion, and she had no way of identifying the particular wood wagon in question. As to the height and width of such wagon plaintiff's witnesses had only given estimates. *Held*, that it was not error to allow a witness, called by defendant, who was familiar with wood wagons in common use, to testify to the height of an ordinary wood wagon. Such testimony was the best evidence the defendant could give under the circumstances.

2. In such case, it is not prejudicial error for the trial judge to remark, in overruling an objection to a question calling for the height of a wood wagon by actual measurement, that the fact that it was a wood wagon was the only information the jury had gotten from the testimony.
3. The appellate court will not review remarks made by the trial court on overruling an objection to testimony, where, while exception was taken to the overruling the objection to the testimony, no exception was taken to the language of the court.
4. In an action for personal injuries, the evidence, stated in the opinion, is *held* to sustain a finding that want of ordinary care and prudence on the part of the defendant was not the proximate cause of plaintiff's injury.
5. In an action for personal injuries it is not error to refuse a requested instruction, which consisted in stating the requisite conduct of a person "in the face of unexpected and deadly danger" where there was evidence tending to prove that such danger was created by such person.
6. Where the jury have found in favor of one party on a given question, no portion of the instructions to the jury on that question can be said to have prejudiced such party in its determination.
7. In an action for personal injuries received by collision with a street car, instructions to the jury on the duties of a traveler, stated in the opinion, are *held* to have informed the jury that the defendant was only responsible for the misconduct of its motorman, and not for the misconduct of others over whom it had no control.
8. In this state, the driver of a private conveyance is the agent of the person in such conveyance, and the driver's negligence, if it contributes to the injury complained of by such person, will defeat the action, and it is not error to so instruct the jury.
9. Where the jury have found that the defendant's negligence was not the proximate cause of the plaintiff's injury, it is unnecessary to consider the question of contributory negligence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injury sustained by the plaintiff about 3 o'clock in the afternoon of September 23, 1902, while riding in a single carriage, drawn by one horse, driven by her companion, by reason of coming in collision with one of the defendant's street cars. It appears and is undisputed that Main street runs north and south in Oshkosh; that the defendant's track is in that street at the place of collision, and for at least one block north and one block south of the same; that Washington street intersects with, and runs east from, Main street, and at right angles with it; that Algoma street intersects with, and runs northwest from, Main street; that the center of Algoma street is twenty-five or thirty feet north of the center of Washington street, at their respective intersections; that the particular locality of such intersections was the most traveled of any in the city, and was paved with vitrified brick, which caused much noise as vehicles passed over the same; that Main street north of such intersections was narrower than south of it; that at the time in question the plaintiff, with her companion, was driving north on the east side of Main street, toward such intersections; that, upon reaching a point at or near the northwest corner of Washington street, they started west across the defendant's track toward Algoma street; that while in the act of crossing the defendant's track they were struck by one of the defendant's cars coming from the north, and the plaintiff was badly injured. The answer was a general denial, and allegations of contributory negligence on the part of the plaintiff and the driver. There is evidence on the part of the plaintiff tending to prove that at the time they started to go across the track the streets at such intersections were full of teams, and that there was a wagon loaded with wood ahead of them, so high as to obstruct their view of the coming car. Issue being joined, and trial had, the jury, at

the close of the trial, returned a special verdict wherein it was found (1) that the plaintiff was injured at the time and place alleged in the complaint; (2) that the defendant, through its employees, was guilty of a want of ordinary care and prudence in the operation of said car at the time of the accident; (3) that such want of ordinary care and prudence on the part of the defendant was not the proximate cause of the plaintiff's injury; (4) that the gong was sounded on approaching the intersection of Main and Washington streets; (5) that the motorman tried to stop the car as soon as it became apparent to him that there would be a collision; (6) that the car was running, when it struck the buggy, eight and one-half miles per hour; (7) that the want of ordinary care and prudence on the part of the plaintiff, *or the driver* of the wagon in which the plaintiff was riding, contributed to produce the injury; (8) that they assessed the plaintiff's damages at $2,000. From the judgment entered upon such verdict for $106.55 costs and disbursements as taxed, the plaintiff brings this appeal.

W. H. Eaton and *L. K. Eaton,* for the appellant.

For the respondent there was a brief by *Weed & Hollister,* and oral argument by *H. I. Weed.*

CASSODAY, C. J. The verdict seems to be supported by evidence. The question for consideration is whether there was any reversible error upon the trial.

1. One of the questions in controversy was whether there was contributory negligence on the part of the plaintiff, in failing to see the coming car in time to avoid driving onto the track immediately in front of it. The evidence on the part of the plaintiff tended to prove that as she and her companion moved north on the east side of Main street, toward the place of collision, as stated, they drove immediately behind a large wood wagon loaded with pine wood, from six to eight feet high and from six to seven feet wide; that they did not know

whose wagon it was, nor who was driving the team. One of the plaintiff's witnesses testified that he thought the wood wagon "belonged to some manufacturing establishment" in Oshkosh; and another, that he should judge that such wood wagon was at the time loaded with pinewood slabs, such as were got out by the Paine Lumber Company of Oshkosh; that he thought the wagon was sixteen feet long; that he "should judge it was the ordinary wood wagon used . . . on the streets by millmen delivering wood" in Oshkosh. In view of such testimony on the part of the plaintiff, we perceive no error in allowing the witness E. C. Owens, on the part of the defendant, to testify that he had lived in Oshkosh thirty-five years, and had been engaged in the business of manufacturing sash, doors, and blinds for twenty-five years, and was familiar with the wood wagons used by the millmen in Oshkosh; that he had measured such wagons to find out their height; that such wagons in use by his company (McMillen Co.), and such as were in usual use, were five feet high; that that company "used in their business wood wagons such as are commonly and ordinarily in use among millmen in the city of Oshkosh for delivering wood;" and that the highest of those wagons were five feet and four inches high, measuring from the ground to the top of the load, and about five feet wide; that such wagons were about the same as those used by the different manufacturers; that the loads driven by Paine Lumber Company, he should think, would be six or seven feet high; and that he supposed that the wood wagons of Morgan Company were about the same as those used by the McMillen Company. The owner of the wagon and the driver of the team were both unknown to the plaintiff and her companion. As appears, the plaintiff's witnesses had only given estimates as to the height of the wagon. The defendant had no way of identifying the particular wood wagon in question. The best evidence the defendant could give, under the circumstances, was as to the height of an ordinary wood

wagon in common use in Oshkosh. Such seems to have been the view of the testimony taken by the trial court in allowing the defendant to show what was the height of an ordinary wood wagon, and stating that such was the only information the jury had got from the testimony that it was such wood wagon. Counsel seem to think that the plaintiff was prejudiced by such remarks of the court on overruling the objection to the question calling for the height of such wood wagon by actual measurement. True, the court might have used more guarded language, but we fail to perceive any reversible error in such remarks of the court. Besides, it was only the objection to the testimony that was overruled, and to which exception was taken. No exception was taken to the language of the court in ruling upon the question. It is hardly necessary to say that the case differs widely from the recent case in this court cited by counsel—*Boyce v. Wilbur L. Co.* 119 Wis. 642, 645, 97 N. W. 563.

2. Error is assigned because the court refused to change the answer of the jury to the third question submitted from "No" to "Yes." This is the important question in the case, as here presented. By the second question the jury had found that the defendant was guilty of negligence in the operation of the car at the time of the accident; and by the third question, that such negligence was not the proximate cause of the plaintiff's injury. The question was peculiarly one of fact for the jury. The argument of counsel seems to be that the finding of the jury upon that question is only supported by the testimony of Owens, already mentioned, and that such testimony was incompetent, and should have been stricken out, as requested by the plaintiff. But as indicated, such testimony was competent. Besides, there was other testimony tending to sustain the third finding of the jury. Several witnesses testified that the gong was being sounded as the car approached the crossing. The motorman on the car testified that as he came down the street he saw the wagon close to the

track, and the horse and buggy, with the ladies in it, behind; and that they turned their horse and got onto the track seven or eight feet in front of the car. A passenger on the car testified that he noticed the wagon loaded with wood in front of the carriage, and that the horse and carriage, back of the wagon, turned north, and the horse came upon the track about ten feet ahead of the car. There is other evidence tending to prove that the ladies could have seen the approaching car before turning onto the track. Of course, if those on the car could, as they approached the crossing, see the ladies in the buggy notwithstanding the wood wagon, then the ladies could have seen the approaching car. We must hold that the evidence was sufficient to sustain the third finding of the jury.

3. It is claimed that the court committed numerous errors in charging the jury. Thirty exceptions have been taken to the charge. Such multiplicity of exceptions tends to weaken confidence in any particular exception. Only two of such exceptions relate to proximate cause. We perceive no error in either of them, and, as neither is mentioned in the brief of counsel, we assume they are not relied on. The only request of the plaintiff to charge upon that question, or any other, consisted in stating the requisite conduct of a person "in the face of unexpected and deadly danger," and was clearly not applicable to a case where there is evidence tending to prove that such danger was created by the person in question. We find no error in submitting the question of proximate cause.

4. Ten of such exceptions relate to the question whether the defendant was guilty of negligence in operating the car. On that question the court charged the jury that the burden of proof was on the plaintiff, and the jury found that the defendant was guilty of such negligence. The jury having found in favor of the plaintiff on that question, it is obvious that no portion of the charge prejudiced the plaintiff as to the determination on that question. The court charged the jury

on that question, however, not only as to the duties and obligations of the defendant and its motorman in operating the car, but also as to the rights, privileges, and expectation of the defendant and its motorman in so operating the car. In order that the jury might properly determine that question, the court also charged the jury as to the duties and obligations of those traveling on foot or in vehicles in streets where such cars were operated, and, among other things, that both parties were bound to use ordinary care and prudence under all the circumstances to prevent collision. Error is assigned because the court charged the jury:

"A traveler upon a street crossing, desiring to cross the street car track there situated, has not the same right to require the speed of a car to be slackened, to enable him to pass over the track, as the person in charge of the car has to require him to give way to allow the car to pass."

And then, after stating that it was the duty of a traveler about to cross a street car track "to look and listen for a coming car, and to perform that duty when and where he will have reasonable opportunity to render his efforts in that regard effective," the court further charged the jury:

"It is as much his duty, as a matter of law, to see an approaching car which is in plain sight and in dangerous proximity to the crossing, and not to negligently place himself in the way of it, as it is to look for the car. Testimony of a person or any number of persons that he or they, when approaching a street car track with a view of crossing it, looked along the track for a coming car, and did not see one, although a car was in plain sight, and so near the point of observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with all reasonable probabilities."

The manifest purpose of such instructions was to inform the jury that the defendant was only responsible for the misconduct of its motorman, and not for the misconduct of others over whom it had no control.

5. Error is assigned because the court further charged the

jury upon the same question to the effect that, if the driver of the vehicle in question was guilty of any want of ordinary care and prudence at the time in question, then the law imputes such negligence to the plaintiff, who was riding with her. In support of such contention counsel cites numerous adjudications, both English and American. But this court held, twenty-seven years ago, in an opinion by Chief Justice RYAN, that "the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person, . . . will defeat the action." *Prideaux v. Mineral Point,* 43 Wis. 513, 526–531. Such ruling has been steadily adhered to during these many intervening years. *Otis v. Janesville,* 47 Wis. 422, 2 N. W. 783; *Ritger v. Milwaukee,* 99 Wis. 190, 197, 74 N. W. 815; *Olson v. Luck,* 103 Wis. 33, 35, 79 N. W. 29. If the rule contended for is to prevail, it is for the legislature to say so.

6. Five exceptions have been taken to the portion of the charge in submitting the seventh question to the jury in respect to contributory negligence. Such portions of the charge were in line with those already considered. On that question the jury were told that the burden of proof was on the defendant. Counsel contend that, under the charge of the court and the wording of that question, it is impossible to tell whether twelve jurymen concurred in finding the plaintiff or the driver guilty of contributory negligence. See *Lowe v. Ring, ante,* p. 370, 101 N. W. 698. But the view we have taken of the case makes it unnecessary to consider that question, or any of the exceptions taken to such portions of the charge, since the jury found that the defendant's negligence was not the proximate cause of the plaintiff's injury.

Other exceptions are without sufficient merit to call for consideration. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

SCHNEIDER, Respondent, vs. REED and others, imp., Appellants.

November 17, 1904—January 10, 1905.

Appeal and error: Party aggrieved: Mortgages: Foreclosure: Findings: Pleading: Cross-complaint: Waiver: Contracts: Uncertainty as to purchase price: Specific performance: Equity: Vendor and purchaser: Equitable lien: Judgment on foreclosure: Provisions.

1. In an action to foreclose a mortgage, a defendant, who had before the commencement of the action conveyed his entire interest in the lands in question to his codefendant, and against whom no personal judgment is rendered, is not aggrieved in any way by the judgment, and under sec. 3048, Stats. 1898 (limiting the right of appeal to a party aggrieved), is not entitled to appeal from the judgment.
2. When lands are conveyed as mere security for a loan, the grantor having no interest in the premises at the time except a bare possession, the transaction is nevertheless a mortgage.
3. In an action to foreclose a mortgage, where, on an issue raised by one who has rights other than as mere mortgagee, all the interested parties being before the court, the court finds that a defendant has some interest in the premises, or claim thereon, which the court can recognize, the court should proceed to determine what that interest is, and by what means it is to be protected in the action.
4. The orderly way of presenting a controversy between defendants is by way of answer containing the essential allegations of a cross-complaint as provided in sec. 2883, Stats. 1898. While it is better pleading to denominate such part of the answer a "cross-complaint," in analogy to the requirements in case of a counterclaim, failure to so denominate the allegations of the answer is effectually waived by voluntarily answering the same.
5. Where the only arrangement as to the price of lands was that the purchaser should pay what the land was worth, and that if the parties could not agree, the price was to be settled by arbitration, one essential of the contract is left wholly uncertain, and it will not be specifically enforced.
6. An agreement to arbitrate will not be specifically enforced.
7. Where a purchaser goes into possession of lands, and, in good faith, makes extensive improvements under an unenforcible

arrangement with the vendor, and the vendor refuses to complete the agreement, the purchaser is entitled, in equity, to compensation for the amount which his improvements have added to the value of the land, less the rents and profits properly chargeable against him while in possession.

8. In such case, it should be determined how much the improvements have enhanced the value of the land, and the reasonable rental value, irrespective of buildings during the vendee's possession, and the balance, in favor of the vendee, if any, adjudged an equitable lien on the premises.

9. In such case, the vendor should be allowed to redeem from such equitable lien, by payment of the amount thereof within a reasonable time, to be fixed by the judgment, with interest from the date of the judgment, but with no deduction for rents and profits accruing after the entry of the judgment.

10. In such a case, where the issue was raised in an action to foreclose a mortgage lien existing on the premises prior to such purchase, the judgment of foreclosure should provide that, in case it becomes necessary to sell the purchased parcel, the same should be sold free from such lien, the equitable lien to be a lien on the surplus, if any, arising from the sale, which surplus should be brought into court for disposition by its order.

11. Where one of two co-mortgagees is a defendant, the judgment of foreclosure and sale should provide that the sale may be moved by either.

12. Where a purchaser of land under an unenforcible agreement in good faith makes valuable improvements, and thereby acquires an equitable lien, such land being subject to a prior mortgage, and in an action to foreclose such mortgage, issues raised between such purchaser and the owner of the equity of redemption are adjudicated, whereby the amount of such equitable lien is fixed, the judgment of foreclosure should provide for some short period within which such equitable lien may be redeemed, and, in case of failure to redeem, or on failure to cause a foreclosure sale within such period, that the owner of the equitable lien may bring an action for strict foreclosure of such lien, subject, however, to the prior mortgage lien.

13. Previous to a loan, the mortgagors agreed that S., one of them, should have a one-third interest on paying his co-mortgagor a certain sum out of the sales of the land. In an action to foreclose such mortgage, it appeared, among other things, that the co-mortgagor conveyed his interest to K., and that S. had never paid such sum. *Held*, that the judgment of foreclosure should definitely declare the title to the equity of redemption to be

in K. as to two thirds and in S. as to one third, in undivided shares, and impose a lien for such sum upon S.'s one third in favor of K., to be paid out of the first sales of the land after the mortgage is discharged, and also provide for the working out of such lien by appropriate directions.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

This is an action to foreclose as real-estate mortgages two instruments which upon their face are absolute deeds of real estate. Before stating the questions principally discussed on this appeal, it will be useful to state certain leading and undisputed facts. It appears that the premises in question consist of a considerable number of acres of land in Winnebago county, Wisconsin, which were originally owned either by Lydia Reed or by Curtis Reed, her husband, and were possessed by them until their deaths, which took place, respectively, in February, 1893, and March, 1895. After the death of Curtis Reed, his sons, the defendants, *W. W. Reed* and *Charles Reed,* continued in possession of the premises, claiming ownership thereof, until December 6, 1898, at which time the legal title as to a part of the premises had vested in Ole Oleson, as trustee of the estate of one Sanford, by virtue of a deed on foreclosure of a mortgage given by the Reeds, dated April 19, 1878; as to another part the title was in Ole Oleson by virtue of a tax deed thereon; and as to another part in the Menasha Wooden Ware Company by virtue of tax deeds. That prior to December 6, 1898, *W. W. Reed* and *Charles Reed* desired to raise $3,000 to redeem the property, and made an oral arrangement with the defendant Joseph Schneider to assist them in raising the money, the said Joseph Schneider to pay one third of the loan and to have one-third interest in the land. The *Reeds* testify that it was also agreed that he was to pay them $2,000 out of his share of sales of the land before he became entitled to any interest therein, but

this is denied by Joseph Schneider. That thereupon another oral arrangement was made by the *Reeds* and Joseph Schneider with the plaintiff, *John Schneider,* and one William M. Gilbert, whereby the last-named parties were to loan to the *Reeds* and Joseph Schneider $3,000 to pay off the claims of Oleson and the Wooden Ware Company, and were to receive a deed of the lands as security for said loan, the *Reeds* and Schneider agreeing to pay the loan on or before three years from that date with interest at six per cent., together with all taxes on the land, and upon such payment to receive a deed of the premises. That this arrangement was carried out, the money being advanced and deeds being made to *John Schneider* and Gilbert, the former furnishing $2,250 and the latter $750 of the consideration. That *John Schneider* thereafter paid taxes on the land, and that there was due him at the time of the entry of judgment in this action in all $3,338.04. That Gilbert paid no taxes. That on December 8, 1900, Gilbert quitclaimed his interests in the land to the defendant *Kerwin,* who had full knowledge of the facts previously stated. That in the spring of 1899 the defendant corporation the Brighton Beach Company was organized by the *Reeds,* Joseph Schneider, and *John Schneider,* and that said corporation went into possession of a part of the land under an oral agreement with the *Reeds* and Joseph Schneider to purchase the same at a price thereafter to be agreed upon, and erected expensive buildings on the same, and are still in possession thereof. That the defendant Frank Engels is the owner of a judgment amounting to more than $8,000, obtained against the Brighton Beach Company by him November 9, 1901, and claims that such judgment is a lien upon any rights of the Brighton Beach Company in the premises. That on December 8, 1900, the defendants *W. W.* and *Charles Reed* quitclaimed their interest in the entire tract to the defendant *Kerwin.*

The defendants *W. W.* and *Charles Reed* answered, in

effect denying that the transaction constituted a mortgage, and claiming that the premises were owned by the plaintiff and the defendant *Kerwin* in equal shares, and alleging that the defendants Joseph Schneider, the Brighton Beach Company, and Engels have no interest in the land. The defendant *Kerwin* answered, admitting the execution of the deeds to *John Schneider* and Gilbert, and alleging that the same constituted a purchase of the land, and conveyed absolute title, and that the alleged agreement to convey the same to the *Reeds* and Joseph Schneider, as well as the alleged agreement by the *Reeds* to convey an interest therein to Joseph Schneider, were void; that he purchased Gilbert's one-half interest, and now owns the same in fee, and that neither the Brighton Beach Company nor Engels has any interest in or lien on said land. By way of cross-complaint he claimed to recover against the *Schneiders* for waste committed on the premises, and for rents and profits received by them after his purchase, and he prayed judgment dismissing the complaint, as well as for an accounting with the *Schneiders,* that the court determine as to whether the defendants Joseph Schneider, Brighton Beach Company, and Engels, have any right or interest in the premises, that they be barred of all rights or interest therein, and that his title be established against them, and for further equitable relief. The court ordered the answers of *Kerwin* and the *Reeds* to be served upon the Brighton Beach Company, Joseph Schneider, and Engels, and gave said last-named defendants twenty days to answer the same. The Brighton Beach Company answered the cross-complaint of *Kerwin,* setting forth the original contract made by the *Reeds* and Joseph Schneider with *John Schneider* and Gilbert, the alleged second contract made by them with the *Reeds* and Joseph Schneider, their possession of the premises and improvements thereon to the extent of $10,000, and claimed an interest in the premises, and demanded that

their interest be protected. *John Schneider* also answered the cross-complaint, reiterating the allegations of the complaint substantially, and denying the allegations of *Kerwin's* answer. Engels answered the cross-complaint, claiming a lien upon the interest of the Brighton Beach Company by virtue of his judgment. Joseph Schneider also answered the cross-complaint.

The action was tried by the court, and findings were made to the effect that the transactions between the *Reeds* and Joseph Schneider on one side and *John Schneider* and Gilbert on the other constituted a mortgage; that the agreement was that Joseph Schneider was to have one-third interest in the land after the mortgage was paid, he also to pay to the *Reeds* out of any sales of the land, if sufficient, for that purpose, $2,000; that *Kerwin* had purchased Gilbert's interest; that the Brighton Beach Company had a valuable interest of an equitable nature in the parcel of land upon which they had built their buildings, but that the character and degree of that interest it was unnecessary to determine, and hence it was left undetermined in this action; that the judgment of Engels was a lien upon that interest, but on no other part of the property; that notice of pendency of the action was duly filed; that no part of the premises consisted of a homestead, and that the same could be sold in parcels. The court also determined the amount due *John Schneider* and *Kerwin,* respectively, upon their mortgage, and directed the usual judgment of foreclosure sale of the premises in seven parcels. No personal liability was found against any of the defendants. Judgment being rendered in accordance with these findings, the defendants *Kerwin, W. W. Reed,* and *Charles Reed* appeal.

J. C. Kerwin, for the appellants.

For the respondent there was a brief by *Henry Fitzgibbon,* and *Thompsons, Reed & Pinkerton,* and oral argument by *A. E. Thompson.*

The following opinion was filed December 13, 1904:

WINSLOW, J. The appeal of the *Reeds* must be dismissed. It stands admitted that before the commencement of this action they deeded to the appellant *Kerwin* their entire interest in the lands in question. No personal judgment of any kind is rendered against them; hence it is apparent that they have no interest in the litigation, and are not aggrieved in any way by the judgment, and hence are not entitled to appeal therefrom. Sec. 3048, Stats. 1898. The appeal of the defendant *Kerwin,* however, raises some serious questions. His first contention is that the deeds to *John Schneider* and Gilbert cannot be held to constitute a mortgage, because the *Reeds* and Joseph Schneider had no interest in the premises at the time except a bare possession, and hence had nothing which they could mortgage. This contention is satisfactorily answered by the holding in the case of *Schriber v. Le Clair,* 66 Wis. 579, 29 N. W. 570, 889, where the defendant had absolutely no interest in the lands deeded, and was not even in possession thereof; yet, it appearing that the lands were conveyed to the plaintiff as mere security for a loan to the defendant, the transaction was held to be a mortgage. Further citation of authority on this point is unnecessary.

The most important contention, however, relates to the question of the claims of the defendants the Brighton Beach Company and Engels. As stated in the statement of facts, the Brighton Beach Company made an oral agreement with the *Reeds* and Joseph Schneider to purchase a certain part of the property (but agreed upon no price), and thereafter erected an expensive building thereon, and afterwards a large judgment was obtained and docketed against the Brighton Beach Company by Engels, and the claim is that the Brighton Beach Company had an equitable interest in the parcel on which they built, and that the judgment of Engels

is a lien upon that interest. The court found that the Brighton Beach Company had an equitable and valuable interest in the parcel on which they built, the character and degree of which was not determined because such determination was unnecessary, and that Engels claimed a lien upon that interest. The appellant *Kerwin* claims that it was error to hold that the Brighton Beach Company had any interest in the lands, and that, if it had any interest, it was error not to determine what that interest was with certainty. Taking up these questions in inverse order, it seems to us that if, in fact, the Brighton Beach Company had any interest in the premises, or claim thereon, which a court could recognize, the court should have determined what that interest was, and by what means it was to be protected in this action. Had *Mr. Kerwin's* rights been simply those of a mortgagee, it seems probable that no such determination would have been necessary, so far as his rights were concerned. All that he could reasonably claim as mortgagee would be a judgment of foreclosure and sale, and a determination of the question as to who was entitled to redeem before sale, and these rights are sufficiently secured by the judgment actually entered. But he was not a mere mortgagee. He had acquired, by purchase before the foreclosure action, title to the interest of the *Reeds,* which on any theory amounted to at least a two-thirds interest in the equity of redemption. So in regard to this two-thirds interest he stood in the double relation of mortgagee and owner of the equity of redemption. As such owner the question whether the Brighton Beach Company and Engels had interests in any part of the premises which could in any way be a burden upon his title acquired from the *Reeds* was manifestly of considerable importance, especially in case of a surplus upon the foreclosure sale, or in case the mortgage was discharged by the sale of a part of the property. "Equity delights in doing justice, and that not by halves." All the parties interested in the question were be-

fore the court, and as the interest of the Brighton Beach Company, if any, was purely equitable, there would seem to be great force in the claim that it should be settled in the present action. In reply to this, however, the claim is made that such a contest between defendants could only be properly considered and decided upon a cross-complaint and that there is no cross-complaint covering this contention in the answer. It may be readily conceded that the most orderly way of presenting such a controversy between defendants is by way of answer containing the essential allegations of a cross-complaint, as fully elucidated in the case of *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776, and afterwards specifically recognized by the statute in sec. 2883, Stats. 1898. It may also be conceded that, inasmuch as the statute now uses the term "cross-complaint" in referring to such an answer, it would be better pleading to so denominate that part of the answer containing the supposed cross-complaint in analogy to the requirements in case of a counterclaim. That course was not followed in the present case, but it by no means necessarily follows that the issues were not fairly before the court. *Mr. Kerwin's* answer, while not denominated a cross-complaint, really contains the essential averments of such a pleading. It admits the execution of the deeds to *John Schneider* and Gilbert, alleges that the oral agreement to convey to the *Reeds* and Joseph Schneider was null and void, sets forth his own purchase of the rights of the *Reeds* and the undivided one half owned by Gilbert, and his consequent ownership of at least one half of the land; alleges that neither the Brighton Beach Company nor Engels has any right or interest in the land, although Engels claims that his said judgment is a lien upon the lands; and asks affirmatively that the claims of said last-named defendants be determined, that his title be established against such claims, and that said defendants be forever barred of all rights in said land. This answer, by order of

court, was served upon the Brighton Beach Company and Engels, and they each made answer thereto, in which they each referred to *Mr. Kerwin's* answer as a cross-bill, and each claimed an interest in the mortgaged premises.

Under this state of the pleadings we cannot doubt that the issue as to the nature and extent of the claims of the defendants in question was fairly before the court, and that, if there was any substantial defect arising from the failure to properly label the allegations of the answer as a cross-complaint, it was effectually waived by the fact that the defendants voluntarily answered the same as though the allegations had been properly named. *Voechting v. Grau,* 55 Wis. 312, 13 N. W. 230. So we must not only regard the question as a proper one to be raised and litigated in this action in order that a complete determination of all conflicting claims be reached in one action, but also as in fact properly raised by the pleadings actually filed. Such being our conclusion, the question as to the extent and nature of the interest, if any, must be considered. The Brighton Beach Company took possession, and made their improvements, under an oral arrangement for purchase made with the *Reeds* and Joseph Schneider, who owned the equity of redemption in the premises. Had this oral agreement been sufficiently definite in its terms, it could doubtless have been specifically enforced in equity. But the difficulty is that no price for the land was agreed upon. Under the most favorable construction of the evidence it appears that the only arrangement as to price was that the company would pay what the land was worth, and that, if the parties could not agree, the price was to be settled by arbitration. Thus one of the essential elements of the contract was left wholly uncertain, and it will not be enforced. *Eckel v. Bostwick,* 88 Wis. 493, 60 N. W. 784. An agreement to arbitrate will not be specifically enforced. *Hopkins v. Gilman,* 22 Wis. 476.

Thus it is plain that the Brighton Beach Company had no

interest in the title of the tract, and no right to compel a conveyance thereof under any circumstances; but it by no means follows from this that, as between them and the owners of the equity of redemption, they had no claim which a court of equity would recognize and preserve, subject, of course, to the prior claim of the mortgage. Eliminating, for the moment, the paramount mortgage interest, the question is whether the company had any equitable rights as against the owners of the equity of redemption. They were not trespassers, but went into possession, and in good faith made extensive improvements under an unenforceable arrangement with the owners of such equity, of which arrangement *Mr. Kerwin* had notice, by the fact of their possession, when he obtained his title. Had ejectment been brought against the company, there could have been no allowance for improvements under the betterment statute, because that statute limits the allowance for improvements to a party in possession who holds adversely in good faith under color of title founded on descent or some written instrument. Sec. 3096, Stats. 1898. But the fact that a court of law, in a purely legal action governed by statutory provisions, may be unable to grant relief, by no means sets bounds to the beneficial powers of a court of equity, especially when the opposing party has himself entered that court, and asked for its decree cutting off the alleged equitable claims. If no relief could be given in the present case to the maker of the improvements, then it would follow that whenever the owner of land succeeded in inducing a third party to enter upon land under an invalid contract of sale, and to make valuable improvements thereon in good faith, he could refuse to carry out the arrangement, and recover his land, with the improvements, without rendering any compensation therefor. We do not find that we are compelled to lay down any such harsh and unjust rule. Mr. Waterman, in his work on Specific Performance, at sec. 281, states the rule thus:

"If the contract is such that it will not be enforced, the vendor will be compelled to refund the purchase money and pay for the improvements of the vendee, deducting therefrom the rents and profits."

It may, perhaps, be doubted whether this proposition is not stated too broadly, but it may confidently be said that the authorities generally hold that, where a purchaser of land, without fault on his part, has in good faith made permanent and valuable improvements thereon, and is unable to compel specific performance of his supposed contract because it is not in writing, and the vendor refuses to complete the same, the purchaser is entitled in equity to compensation for the amount which his improvements have added to the value of the land, less the rents and profits properly chargeable against him while in possession. 16 Am. & Eng. Ency. of Law, 96, 97, tit. IMPROVEMENTS; *Parkhurst v. Van Cortlandt,* 1 Johns. Ch. 273; *Rhea v. Allison,* 3 Head, 176; *Thouvenin v. Lea,* 26 Tex. 612; *Duke v. Griffith,* 13 Utah, 361, 45 Pac. 276; *Bender's Adm'rs v. Bender,* 37 Pa. St. 419; *Winton v. Fort,* 5 Jones Eq. 251; *Chabot v. Winter P. Co.* 34 Fla. 258, 15 South. 756; *S. C.* with note, 43 Am. St. Rep. 192. This principle should be applied in the present case. Testimony should be taken on the question as to how much the hotel built by the Brighton Beach Company has enhanced the value of the parcel which their oral agreement to purchase covered, and also upon the question as to the reasonable rental value of that parcel irrespective of buildings during their possession, and the balance in favor of the company, if any, should be adjudged to be an equitable lien upon the parcel, subject to the mortgage, and the lien of the Engels judgment, when docketed, should be held to attach thereto. The owners of the equity of redemption should be allowed the right, if they choose, to redeem from such equitable lien by payment of the amount thereof, with interest from the date of the judgment within a reasonable time, to be fixed

by the judgment, with no deduction for rents and profits accruing after the entry of judgment, in analogy to the statutory provisions as to the payment by the plaintiff of the amount allowed for improvements in an ejectment action. Sec. 3098, Stats. 1898. The period allowed by the last-named section is three years, but it is deemed that eighteen months would be the proper period in the present case.

It was rightly held by the trial court that, if foreclosure sale should be necessary, the premises should be sold in parcels, the parcel deeded to the defendant the Fox River Valley Electric Railroad Company being sold last, because it was first conveyed, and the parcel possessed by the Brighton Beach Company being sold next to the last. It should further be provided by the judgment that, in case it becomes necessary to sell the Brighton Beach parcel for the reason that the previously sold parcels have not produced enough to discharge the mortgage, the same should be sold free from the lien, and that the only equity then remaining to either the Brighton Beach Company or Engels should be a lien upon the surplus, if any, arising from the sale of that parcel, which surplus should be brought into court for disposal by order of court. The judgment should also provide that the mortgage foreclosure sale may be moved by either the plaintiff, *John Schneider,* or the defendant *Kerwin,* to the end that there be no delay in such sale at the close of the mortgage redemption period of one year, and that the sale may take place before the expiration of the eighteen months allowed for redemption from the equitable lien of the Brighton Beach Company. It should also be provided that, in case of failure to redeem from the latter lien within the eighteen-months period, and failure for any reason to cause a foreclosure sale of the tract within that period, the Brighton Beach Company and Engels be permitted to bring an action for strict foreclosure of such lien, subject to the mortgage lien, if such lien still exists.

The only remaining assignment of error which is considered of sufficient importance to be noticed is that relating to the interest of the defendant Joseph Schneider. The court having found that the original transaction was, in legal effect, a mortgage between the *Reeds* and Joseph Schneider as mortgagors and *John Schneider* and Gilbert as mortgagees, it results necessarily that the *Reeds* and Schneider became the owners of the equity of redemption in equal undivided shares, though there was no specific finding or judgment to this effect. The court further found, however, that it was agreed between the *Reeds* and Schneider, before procuring the loan, that Schneider was only to have his third interest on paying to the *Reeds,* out of any sales of the land, if there was enough for the purpose, the sum of $2,000. This finding has never been excepted to by Schneider, and he has taken no appeal, so he is bound by it. There have been no sales of land, and no money paid by Schneider. The trial judge made no finding or judgment further defining Schneider's interest, liabilities, or rights; although in his written opinion he says that the *Reeds* became entitled to a lien upon his interest in the land, whatever it was, for the $2,000, and that to these rights *Kerwin* succeeds. The judgment gives *Kerwin* no such relief, and his failure is assigned as error. The preliminary agreement between the *Reeds* and Joseph Schneider, whatever it was, seems to have been, as between themselves, the very foundation of the subsequent transaction with *John Schneider* and Gilbert, and no good reason is perceived why, in this equitable action, it should not be made effective. To adjudge him to be the absolute owner of one-third interest in the title of the mortgaged lands on equitable principles, when it stands confessed that he has in no way paid, and is not to be required to pay, what was agreed as the consideration therefor by the terms of the arrangement on which his interest is based, is an anomaly in the administration of the principles of equity. The judgment should de-

finitely declare the title to the equity of redemption in the mortgaged lands to be in *Kerwin* as to two thirds and in Joseph Schneider as to one third, in undivided shares. It should also impose a lien upon Schneider's one third (subordinate, however, to the interests of the Brighton Beach Company and Engels as to the parcel occupied by said company) in favor of *Kerwin* for $2,000, without interest, and to be paid out of moneys received from the first sales of the land after the mortgage is discharged. It should also provide for the working out of this lien by providing that Schneider might pay it in cash, and thus clear his title therefrom, by further providing that, in case of redemption by *Kerwin* of *John Schneider's* interest in the mortgage, he should have not only his rights to sell Joseph Schneider's one-third interest by foreclosure sale, to pay his share of the mortgage debt, but also should retain the $2,000 lien in that interest; that in case of redemption by Joseph Schneider he should be subrogated to the mortgagees' right to sell at the foreclosure sale *Kerwin's* two thirds interest to pay the *Reeds'* two thirds of the mortgage debt, the lien for $2,000 in favor of *Kerwin* still remaining on his one third; that in case of sale upon foreclosure resulting in a surplus *Kerwin* should have a lien upon such surplus (subject to the lien of the Brighton Beach Company and Engels in any surplus on the Brighton Beach tract, to the amount of $2,000, and that so far as said lien is paid by such surplus the balance of the land remaining unsold, if any, be relieved from said lien.

As modified by the foregoing suggestions, the provisions of the former judgment should be embodied in the new judgment.

By the course above indicated it is believed that the rights of all parties will be properly protected. Further testimony should be taken upon the question of enhancement in value of the Brighton Breach parcel by the improvements thereon,

and upon the question of the reasonable rental value thereof while occupied by the company, but upon no other questions.

By the Court.—Judgment reversed, and remanded for further proceedings, and for judgment in accordance with law and this opinion.

KERWIN, J., took no part.

On January 10, 1905, the mandate in this case was amended so as to read as follows:

By the Court.—The appeal of *Charles Reed* and *W. W. Reed* is dismissed with costs; and upon the appeal of *J. C. Kerwin* the judgment is reversed with costs and the action remanded for further proceedings and for judgment in accordance with law and this opinion.

GARSKE, Respondent, vs. TOWN OF RIDGEVILLE, Appellant.

November 19, 1904—January 10, 1905.

Highways: Defective condition: Personal injuries: Negligence: Notice of injury: Evidence: Witnesses: Memoranda: Competency: Appeal and error: Declarations by a public officer as admissions: Instructions to jury.

1. In an action for personal injuries received on a defective highway, the notice of injury required by sec. 1339, Stats. 1898, as testified to by the draftsman, in connection with evidence of the knowledge of the highway officers as to the *locus in quo*, stated in the opinion, is *held* to be sufficient under the provisions of that part of said section declaring that no notice of injury shall be deemed insufficient or invalid solely because of inaccuracies, if it shall appear that there was no intention on the part of the person giving the notice to mislead the other party, and that such party was not in fact misled thereby.
2. Where the witness who drew a notice had made a memorandum in respect to it, the mere fact that he did not have the

memorandum present in court when giving his testimony, does not prevent him from testifying to such facts as he remembers.

3. The mere fact that such witness had given a somewhat different version of the contents of such notice in a deposition, taken several months before the trial, does not prevent him from giving oral testimony as to its contents on the trial.
4. In an action for personal injuries received on a highway, it is not error to exclude testimony tending to prove that other persons drove their teams over the place in question about the same time without having any trouble.
5. Declarations of a public officer cannot be given in evidence as admissions to bind the municipality of which he is the agent, unless they are part of the *res gestæ*.
6. Where the evidence as to service of the notice of injury required by sec. 1339, Stats. 1898, was testimony tending to show declarations by the town chairman, made more than a month after the injury, that he had received such notice, they are not part of the *res gestæ*, and incompetent to prove such service.
7. An instruction to the jury: "In determining where the preponderance or weight of the evidence lies, *that is not to be determined* by the number of witnesses on either side, or by the number of witnesses on any particular material point," while erroneous, is *held* not to be misleading because followed by the further and correct instruction: "But that evidence is said to preponderate or outweigh on any given question which is the most satisfying or the most convincing to your minds after you have thoroughly and carefully considered it. It is for you to determine the credit and weight to be given to each witness in the case."

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries sustained by the plaintiff by reason of an alleged defective highway June 2, 1902. The complaint is in the usual form in such cases. The answer consists of admissions, denials and counter allegations of contributory negligence. At the close of the trial the jury returned a verdict in favor of plaintiff, and assessed his damages at $400. From the judgment entered thereon in favor of the plaintiff, the defendant brings this appeal.

For the appellant there was a brief by *Masters & Graves,* and oral argument by *R. B. Graves.*

For the respondent there was a brief by *Doherty & Baldwin,* and oral argument by *C. L. Baldwin.*

CASSODAY, C. J. 1. One of the sharply controverted questions was whether the notice in writing prescribed by sec. 1339, Stats. 1898, was made and served as therein required within thirty days after the injury. It appears that on application of the plaintiff, and on or about June 20, 1902, the witness Newhouse, a justice of the peace, wrote a notice which, as he thought, fulfilled the requirements of that section of the statute, and the same was signed by the plaintiff, but he kept no copy of it, and which notice, it is claimed, was served as required by the statute. Against objection, the witness was allowed to testify to the contents of the notice as follows:

"I wrote that notice, I think, to the supervisors of the town of *Ridgeville,* just the same as sec. 1339 says. I fulfilled all the requirements, I think. My best recollection is that I had it before me. I know what the notice was. I stated in the notice: 'To the Town Board of Supervisors,' I think, 'of the Town of *Ridgeville,* Monroe County, Wisconsin—Gentlemen: Please take notice' (somewhere near that) 'that I, *August Garske,* did, on the 2d day of June, 1902' (I believe I put 'A. D.' to it) 'sustain a severe injury by reason of the insufficiency of the bridge, or of the bridge being out,' and what he went through (I forget what I called that now)—'being dangerous, or by neglecting to have it in a safe, passable way'—and I stated the time and place exactly. I stated it was on that little crossroad from Bill Myers, near Bill Myers, south of Bill Myers, in the public highway there running south, the bridge being out, and a fence on both sides, and could not get out any other way, and had to pass through the creek; and he was thrown off his buggy or wagon, or whatever it was—buggy, I think—and received severe internal injuries, for which he claimed damages. The notice was given to *Garske.* I don't know whether

he sent it or not. He signed it, and I put an affidavit to it. I saw him sign it. It was in my handwriting, except the signature of *Garske.*"

The court charged the jury, as a matter of law, that the form of the notice was sufficient to answer the requirements of the statute. The same section of the statute declares:

"No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repair which caused the damage for which satisfaction is claimed, provided it shall appear that there was no intention on the part of the person giving such notice to mislead the other party and that such party was not in fact misled thereby." Sec. 1339, Stats. 1898.

Under this statute it has been held that where it appears from the surrounding circumstances that the notice was given in good faith, and without any intent to mislead, and did not in fact mislead, it was sufficient, although indefinite and uncertain in some particulars. *Hoffman v. North Milwaukee,* 118 Wis. 278, 281, 282, 95 N. W. 274. Before attempting to prove the contents of the notice, it appeared in evidence that the bridge over the creek had been washed out about two weeks prior to the accident; that, after the bridge went out, teams crossed the creek on a side track, in which it is claimed there was a deep hole, into which one of the wheels of the plaintiff's carriage went at the time of the accident. There seems to have been only that one way to drive down through the creek, and that was fenced on both sides. The pathmaster of the town testified to the effect that he was at the *locus in quo* soon after the bridge was washed out; that two days after the washout the town board were there, and looked it over; that they did not then cut out a place to go down to the creek on the south bank, but he did before the day of the accident; that he cut it out a little to make it wide enough; that there was a driveway right through there before the washout. Under the circumstances, we cannot say that

there was any error in holding, as a matter of law, that such notice was sufficient in form. The mere fact that the witness who drew the notice had made a memorandum in respect to it, which he did not have with him at the time of giving his testimony in court, did not prevent him from testifying to such facts as he remembered. Nor did the mere fact that the witness had given a somewhat different version of the contents of the notice in a deposition taken some months before the trial prevent him from giving such oral testimony. *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897, 901, 902.

2. We perceive no error in excluding testimony tending to prove that other persons drove their teams over the place in question about the same time without having any trouble. Such testimony has frequently been held to be error by this court. *Bloor v. Delafield,* 69 Wis. 273, 34 N. W. 115; *Phillips v. Willow,* 70 Wis. 6, 34 N. W. 731; *Barrett v. Hammond,* 87 Wis. 654, 657, 658, 58 N. W. 1053; *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 649, 650, 86 N. W. 662. The court did give the defendant ample latitude to show the condition of the highway at the time and place in question.

3. Error is assigned because the court refused to direct a verdict in favor of the defendant. The principal ground upon which this contention is based is the failure of the plaintiff to prove by competent evidence that the notice written by Newhouse, mentioned, was ever served upon "a supervisor of the town," as required by the statute (sec. 1339). The plaintiff testified to the effect that he signed the notice written by Newhouse, and gave it to his neighbor to mail; that prior to that he had sent two letters to the chairman of the town, Albert Grill, which Grill on June 19, 1902, admitted to him he had received; and Newhouse testified to the effect that after he gave the notice to the plaintiff, and on July 4, 1902, more than a month after the accident, the

chairman of the town, Albert Grill, admitted to him that he had received the notice June 20, 1902. Grill testified to the effect that he did receive two letters from the plaintiff, but no other letter referring to the injury; that he was acquainted with the handwriting of Newhouse; that neither of the letters he received was in his handwriting; and that he never received any such notice as that testified to by Newhouse. There is no evidence that the notice sent by the neighbor was ever deposited in the post office. The question recurs whether it was competent to prove service of such notice by an admission of Grill long after the accident. It is well established:

"The declarations of a public officer cannot be given in evidence as admissions to bind a municipal corporation of which he is the agent unless they are part of the *res gestæ.*" *Cortland Co. v. Herkimer Co.* 44 N. Y. 22; *Clapper v. Town of Waterford,* 131 N. Y. 390, 30 N. E. 240.

So it is held:

"The declarations of a surveyor of highways in relation to work done on the highways of the town under a contract made by him within the scope of his authority, uttered some months after the completion of the work, though before the expiration of his official year, are not admissible in evidence against the town." *Burgess v. Inhabitants of Wareham,* 7 Gray, 345.

"Declarations by officers of a corporation rest upon the same principles as apply to other agents." *Pennsylvania R. Co. v. Butler,* 57 Pa. St. 339; *Franklin Bank v. Cooper,* 36 Me. 179; *Peek v. Detroit Novelty Works,* 29 Mich. 313; *Hall v. Murdock,* 119 Mich. 389, 78 N. W. 329; *Beunk v. Valley City Desk Co.* 128 Mich. 562, 568, 87 N. W. 793; *Goetz v. Bank of Kansas City,* 119 U. S. 551, 560, 7 Sup. Ct. 318, 30 L. Ed. 515.

These cases are in harmony with the repeated rulings of this court. *Felt v. Amidon,* 43 Wis. 467; *Stone v. N. W. Sleigh Co.* 70 Wis. 585, 36 N. W. 248; *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085; *Grisim v. M. C. R. Co.* 84 Wis. 19, 22, 54 N. W. 104; *Huganir v. Cotter,* 92

Wis. 1, 4, 65 N. W. 364; *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 99 N. W. 366, 368. In a recent case admissions of the president of the village, made subsequent to the accident, were held admissible as tending to prove knowledge on his part prior to the accident that the street had been used as alleged. *Radichel v. Kendall,* 121 Wis. 560, 99 N. W. 348, 350. But there was no purpose in that case of trenching upon the well-established rule mentioned, and, in so far as it seems to do so, it must be regarded as overruled. The notice required by the statute was, of course, a condition precedent to maintaining the action. *Daniels v. Racine,* 98 Wis. 649, 74 N. W. 553; *Ziegler v. West Bend,* 102 Wis. 17, 78 N. W. 164. Without proof of the service of such notice, there could be no recovery. Otherwise the evidence seems to have been sufficient to take the case to the jury.

4. Exception is taken because the court charged the jury:

"In determining where the preponderance or the greater weight of the evidence lies, *that is not to be determined* by the number of witnesses on either side, or by the number of witnesses on any particular material point."

From this statement the jury may have inferred that the number of witnesses upon any given question was of no consequence, and not to be considered, and hence subject to the criticism which this court has frequently made. *McCoy v. Milwaukee St. R. Co.* 82 Wis. 215, 217, 218, 52 N. W. 93, and cases there cited; *Hardy v. Milwaukee St. R. Co.* 89 Wis. 183, 185, 61 N. W. 771. The error in the charge in that case was quite similar to the one in the case at bar, but it was there held not to be misleading, because it was followed by a further and correct charge to the jury in the same connection. So here the jury were told in the same connection:

"But that evidence is said to preponderate or outweigh on any given question which is the most satisfying or the most convincing to your minds after you have thoroughly and carefully considered it. It is for you to determine the credit and weight to be given to each witness in the case."

The error, however, should not be repeated. Other exceptions to the charge have not been overlooked, but none of them are regarded as of sufficient consequence to call for special consideration here.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ROWELL, Appellant, vs. SMITH, Administrator, Respondent.

December 13, 1904—January 10, 1905.

Res adjudicata: *Judgments: Conclusiveness: Parties: Privies: Cause of action: Statute of frauds: Specific performance: Election of remedies: Estoppel* in pais: *Waiver: Laches: Mutual mistake: Collateral promises.*

1. A judgment is conclusive between the parties thereto and their privies in a second action on the same claim or cause of action, as to all questions that were, or might have been, litigated in the first action, and is likewise conclusive in a second action upon a different claim or cause of action, as to every proposition within the issues at first, which was presented for adjudication and decided. In this rule the mere personal effect is confined to the parties, while the term "privity" suggests mutual succession or relation to the same property or property right. *Hart v. Moulton*, 104 Wis. 354.
2. Where a person not a party to an action will be liable to another who is a party if the latter's claim or defense shall fail, and such person has notice of the action and opportunity to participate therein in defense or maintenance of his position, he will be bound by the result the same as if he were a party to such action.
3. A cause of action to enforce a supposed valid agreement to answer for the debt, default or miscarriage of another is different from one based on the circumstance resulting in the supposed valid agreement to compel specific performance of a verbal agreement to make a valid guaranty or to reform one defectively written so as to make the same accord with the intention of the parties.
4. The doctrine of election of remedies applies only where there

are two or more appropriate ways to vindicate the right of a controversy, but the relations between the parties necessary to the pursuit of one successfully, are such that concurrent existence of those necessary to the pursuit of the other or others is impossible.

5. Unsuccessful use of a remedy, supposed to be, but in effect not, appropriate to vindicate the right of a particular matter, either because the facts turn out to be different than plaintiff supposed them to be, or the law applicable to the facts is found to be different than supposed, though the first action proceeds to judgment, does not preclude plaintiff from thereafter invoking the proper remedy.

6. Neither the doctrine of election nor *res adjudicata* applies to the situation suggested in the preceding paragraph, though if the second remedy invoked is in equity and the defendant would be seriously prejudiced by plaintiff's mistake if he were permitted to proceed the second time, the court might apply principles of estoppel *in pais* if deemed necessary to prevent injustice.

7. Where more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one with knowledge, or reasonable means of knowledge, of the facts, the other no longer exists.

8. Where more than one remedy to deal with a single subject of action exists and they are not inconsistent all may be used concurrently, but a satisfaction in one is a satisfaction in all.

9. Where only one remedy exists to deal with a single subject-matter, but through mistake one not appropriate is invoked, the proper remedy is not thereby waived.

10. Mere delay for any length of time, short of a period sufficient to extinguish the right under the statute of limitations, does not bar an action in equity to vindicate such right.

11. Mutual mistake, either of fact in making a contract or of law or fact in reducing the same to writing, is remediable, in the absence of a waiver of the right in that regard or estoppel to the assertion of it.

12. A verbal agreement to make a collateral promise can no more be dealt with in equity to save the collateral promisee from the consequences of noncompliance with the statute of frauds, than a written agreement in that regard, which is fatally defective for noncompliance with such statute.

13. A court of equity will not take jurisdiction to compel specific performance of a verbal agreement to make a valid contract of guaranty where it would not reform such a contract, through mutual mistake defectively reduced to writing.

14. A mere collateral promise to answer for the debt, default or miscarriage of another, invalid because not reduced to writing, or because defectively so reduced, is not susceptible of part performance as between the principal contracting parties so as to afford the collateral promisee a right of action in equity to compel the making of a valid guaranty in writing, to reform the one defectively made.
15. The doctrine that in case a contract, required to be made in a particular way to be valid under the statute of frauds, is not so made, a court of equity will deem the statute "uplifted" and enforce the obligation growing out of the circumstances of the situation so as to prevent the consequences that would otherwise flow from such statute, where, if that were not done, it would be used as an instrument of fraud instead of one to prevent fraud, does not apply, if the effect would be to essentially nullify the statute.
16. In applying the maxim "There is no wrong without a remedy" courts of law and equity as well must regard wrong, so called, which is not remediable because of the statute on the subject, as not wrong at all in a judicial sense.
17. The doctrine as to part performance taking a transaction out of the statute of frauds so that the relations between the parties may be dealt with judicially to prevent injustice, is grounded on the idea that the opposite party by the statute and such part performance has obtained title to something of value for which, independently of the statute, he should render an equivalent.
18. The doctrine mentioned in the last paragraph cannot apply as between the parties to a mere collateral promise which is within the statute of frauds, because as to such neither part nor full performance by the collateral promisee enriches the collateral promisor.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action for equitable relief. Plaintiff sold one Goodrick 470 shares of the capital stock of the Valley Iron Works Manufacturing Company, and A. L. Smith, since deceased, 170 shares of such stock under an agreement that the purchase price to the former amounting to $5,000, should be paid in accordance with five $1,000 notes due in two, three,

four, five and six years, the first three thereof to be guarantied by said Smith. Pursuant to the verbal agreement in that regard plaintiff delivered the stock, Goodrick signed the five notes and Smith placed on the back of the first three to fall due the words:

"I hereby guarantee the payment of the within note.

"A. L. SMITH."

omitting by mistake, as is alleged, the words "for value received" from the body of the guaranty, the notes were delivered in the form indicated to the plaintiff, and the Goodrick stock was placed in Smith's possession to secure him against loss on account of the guaranty. Smith and Goodrick were jointly interested in purchasing the stock to the end that they might control the policy of the corporation. Before the maturity of the two-year note plaintiff transferred it to a *bona fide* holder for value, and thereafter before such maturity Smith recognized his agreement to guaranty the payment thereof by duly waiving demand for payment of the same and protest for nonpayment, and placing thereon, in due form, a guaranty for such payment, expressing a sufficient consideration to satisfy the statute of frauds. Plaintiff at the time of the commencement of this action was the owner of the notes and Goodrick was insolvent.

The foregoing circumstances were pleaded by the plaintiff in the form of four separate causes of action against the personal representatives of Smith, followed by a prayer for relief as follows:

(1) Specific performance of the agreement to guaranty the second and third notes. (2) For reformation of such notes. (3) Judgment upon the note validly guarantied. (4) Judgment for $2,000, on account of the purchase price for the stock represented by the second and third notes. (5) Such other relief as to the court might seem just.

The defendant demurred to each of the pretended causes of action upon four grounds: Want of equity, insufficiency

of facts, defect of parties plaintiff and misjoinder of causes of action.

The demurrer was overruled. Defendant then answered to this effect: The alleged guaranty was without consideration and void under the statute of frauds. Before the commencement of this action and on the 6th day of September, 1898, suit was commenced on the notes in question which was thereafter, without trial, discontinued. The Commercial National Bank of Appleton, indorsee from plaintiff on the four-year note, commenced an action against the decedent and Goodrick in the circuit court setting forth in the complaint the circumstances alleged in the complaint herein characterizing the making of the guaranty. The action was tried resulting in a judgment dismissing the same as to Smith, and on appeal to the supreme court the judgment was affirmed. [*Commercial Nat. Bank v. Smith,* 107 Wis. 574.] Lawrence University, a corporation, indorsee of the plaintiff, April 12, 1899, commenced an action against Smith and Goodrick in the circuit court on two of the notes mentioned in the complaint, being the one payable in two years, and the one payable in three years. The decedent appeared and answered and thereafter, before the cause was reached for trial, it was discontinued.

Upon the issues joined the cause was tried resulting in findings of fact as to the circumstances under which the alleged guaranty was made in harmony with the complaint. Among other things the court found specifically, thus:

When the transaction between plaintiff, Goodrick and Smith in regard to the stock was closed up, Smith and the plaintiff were represented by their respective attorneys. The guaranty, as signed, was submitted to such attorneys and approved by them. They and all of the parties interested then believed the guaranty to be sufficient to satisfy the statute of frauds. Plaintiff agreed to sell the 470 shares of stock to Goodrick upon the express condition that three of the $1,000

notes should be satisfactorily guarantied. The stock was transferred to Goodrick upon the faith of Smith's promise to guaranty the payment of such three notes. It was agreed in writing between Smith and Goodrick that the stock should be assigned in trust to secure Smith against liability on account of his guaranty. He demanded that as a condition of becoming guarantor on the notes. In the year 1896, without any new consideration, Smith signed upon the back of the two-year note a guaranty good in form and duly waived demand for payment of such note, and protest for nonpayment.

There were findings in harmony with the allegations of the answer as to the commencement of and termination of three actions in regard to the notes prior to the commencement of this action, and findings to the effect that before the commencement of this action plaintiff requested decedent to place a valid guaranty upon the back of the notes, which he refused to do; that decedent died after the commencement of the action, and that the same was duly revived against his personal representative.

As conclusions of law the court held that plaintiff was entitled to recover against decedent's personal representative upon the note that was reguaranteed, but not upon the others. Judgment was rendered accordingly from which plaintiff appealed.

J. C. Kerwin, for the appellant.

For the respondent there was a brief by *Hunter & Goff,* of counsel, and oral argument by *C. F. Hunter.*

MARSHALL, J. The logical treatment of this appeal seems to require the contention of respondent's counsel that the decision in the action to enforce the four-year note is a bar to any relief in this action upon principles of *res adjudicata* to be first considered. The scope of such principles has been too often pointed out to require more than a statement there-

of at this time. A judgment whether pleaded in bar, or given in evidence in estoppel, as to every question within the issues in the cause wherein it was rendered, whether actually presented and solved or not, as between the parties to the litigation and their privies, till reversed or set aside in due course of law,—is conclusive as to the truth of the matter involved in that and any action subsequently tried to enforce the same cause of action whether in the same or in any other court, and it is likewise conclusive in any subsequent judicial controversy upon a different cause of action between the same parties, or their privies, as to any question within the issues actually presented and decided. *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Grunert v. Spalding,* 104 Wis. 193–213, 80 N. W. 589; *Hart v. Moulton,* 104 Wis. 349–353, 80 N. W. 599. A cause of action for equitable relief from the consequences of accepting a void guaranty is essentially different from an action upon the guaranty. The former action proceeded upon the theory that there was a valid contract between the parties, while this action was grounded upon the theory that at best there was only an enforcible agreement to make such a contract. Hence, in any event, only the results of questions actually presented and adjudicated before need be considered now on this branch of the case. Such results are verities for the purposes of this litigation. The parties are not the same now as before, but the respondent is the personal representative of Smith, and as such a privy as regards the former suit, while the plaintiff now was, in the main, the party interested then and is bound the same as if he were a party to the record. The action was prosecuted in his interest. He had notice thereof, an opportunity to participate therein, and embraced it. As between him and his assignee of the note, in whose name the suit was brought, the result here was conclusive, the same as between such assignee and the defendant. In such circumstances, for all purposes of the doctrine of *res adjudicata* he

was a party to the suit. *Saveland v. Green,* 36 Wis. 612; *Daskam v. Ullman,* 74 Wis. 474–477, 43 N. W. 321; *Carroll v. Fethers,* 82 Wis. 67–72, 51 N. W. 1128; *Grafton v. Hinkley,* 111 Wis. 46–54, 86 N. W. 859. The important question common to both actions and decided on the former occasion [*Commercial Nat. Bank v. Smith,* 107 Wis. 574], is whether the guaranty was based on a consideration independently from that afforded the maker of the note, and moving from the guarantee to the guarantor so as to take the transaction out of the statute of frauds. That was decided before in favor of the decedent. The case turned on the solution of that question on the appeal to this court. It follows that, regardless of the evidence now in the record and even the findings of the trial court, if contrary thereto, this case must be viewed as if Smith's promise was merely collateral to that of Goodrick and so within the statute of frauds.

Except as above indicated, the doctrine of *res adjudicata* does not bar the way to favorable consideration of appellant's appeal. The mere fact that in the former action it was claimed there was a guaranty good at law, and on the second occasion that must be deemed to have been abandoned and the action grounded on a transaction not culminating in a legal contract as intended, is not sufficient to render the former judgment a bar to the successful prosecution of this action upon principles of *res adjudicata.*

We are not unmindful of the decisions that a judgment in an action to recover on a contract of a particular character is a bar to one subsequently commenced involving the same transaction, either at law or in equity, upon the theory that the contract was not as at first alleged, but of a materially different character. There is a logical basis for such decisions, but it does not lie in the doctrine of election between inconsistent remedies or *res adjudicata,* but rather in the doctrine of estoppel. Some of such cases plainly, it would seem, confuse the two former doctrines and overlook the lat-

ter. True, the distinction between estoppel and *res adjudicata* is sometimes so shadowy that one, without careful analysis, would blend into the other. Nevertheless there is a distinction. We will not stop in our labor here to point it out, but assume that its existence is well understood.

Washburn v. Great Western Ins. Co. 114 Mass. 175, is one of the most significant of the cases above referred to. From our investigations we may well venture to say it is the pioneer case. There plaintiff brought an action to recover on a policy of insurance containing a warranty. He pleaded compliance therewith. Upon being defeated for a breach thereof he filed a bill in equity for a reformation of the policy by striking out the warranty, alleging that the same was contrary to the verbal agreement and was inserted in the writing by mistake. The court held that the judgment in the first action was a bar to the prosecution of the second, the decision being put squarely on the doctrine of election. Reference was made thereto in this way, quoting the language of Chancellor KENT:

"The suit at law and the action here are inconsistent with each other, since the one affirms, and the other seeks to disaffirm, the contract in question. Any decisive act of the party, with knowledge of his rights and of the fact, determines his election, in the case of conflicting and inconsistent remedies."

We fail to see wherein the remedies the court was dealing with were conflicting and inconsistent within that rule. Both proceeded upon the ground that there was a contract. If it was as at first alleged, an action at law was the only remedy to enforce it. If it was as alleged on the second occasion, an action in equity for a reformation thereof was the only remedy. The doctrine is well established that there can be no choice between two inconsistent remedies unless there are in fact two remedies to choose from, and they are really inconsistent, in that one is suitable to deal with relations between

the parties of one character and the other with relations of a different and inconsistent character. The rule, it will be seen, was correctly illustrated by the court, but improperly applied. *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 85 N. W. 698. It might well have said that the plaintiff was estopped from successfully invoking equity to enforce a contract of one character after, with knowledge of the facts, having put the defendant to the expense of defending in an action at law against a claim that it was of a different character. It is significant that it did not occur that the decision could be grounded upon the doctrine of *res adjudicata.*

In *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498, the circumstances were the same as in *Washburn v. Great Western Ins. Co. supra,* and the result the same. It was based, however, upon the doctrine of *res adjudicata* and it would appear that of election as well, *Washburn v. Insurance Co.* being pointed out as authority, without indicating that the inconsistency of grounding one case on the doctrine of *res adjudicata* and the other on the doctrine of election was appreciated. In support of the Massachusetts decision there was at least noted a prime essential of the situation permitting the exercise of election between inconsistent remedies, viz.: "The state of facts necessary to support one remedy did not coincide with the facts necessary to support the other." *Barth v. Loeffelholtz,* 108 Wis. 562–568, 84 N. W. 846. It may be well assumed that such feature led to the decision being grounded as it was, though manifestly such a situation may and does often exist where other essentials to the application of the doctrine of election are absent. In the New York case, though the two are alike, the court considered that the same evidence would sustain either claim, which seems to be clearly contrary to the fact, and so justified the result upon the doctrine of *res adjudicata,* at the same time using terms indicating that the doctrine of election applied as well.

Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344, is another

case of the character referred to. Both cases we have discussed are cited therein as authority for the conclusion reached. The doctrine of election and of former adjudication were both referred to, and, as in the other instance, without appreciating the distinction between the two. That is quite clear, in that it was not seen that the Massachusetts case went distinctly upon the ground of election while the New York case, though it went upon the doctrine of *res adjudicata,* referred to the Massachusetts case for authority. In a later case the Minnesota court recognized that *Thomas v. Joslin, supra,* turned on the doctrine of election. *Spurr v. Home Ins. Co.* 40 Minn. 424, 42 N. W. 206. But a distinction between the two cases was suggested, in that in the former situation the first case proceeded to final judgment, while in the latter it did not. The circumstance was rightly deemed important as regards the doctrine of *res adjudicata* or estoppel, but not that of election, since any affirmative act with knowledge of the facts to enforce one remedy, such as the commencement of an action, as effectually waives all other remedies as the prosecution of an action to judgment. *Smeesters v. Schroeder, ante,* p. 116, 101 N. W. 363. In a still later case, *Rossman v. Tilleny,* 80 Minn. 160, 83 N. W. 42, as we read it, a situation similar to that in *Thomas v. Joslin, supra,* was presented. Defendant was put to the expense of a successful defense to a claim against him for stipulated compensation for professional services. Plaintiff persisted until judgment was rendered against him. He then commenced a new action upon the theory of implied contract and *Thomas v. Joslin, supra,* was invoked in vain, the court remarking as to the latter situation that the evidence required in the two actions was different, inferentially saying that in the former situation it was not, which seems plainly to be contrary to the fact, and to the prevailing idea in the case, which was there pointed to as authority, viz.: *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498. However, in this later case

we find suggested for the first time what seems to be the only legitimate basis for the decision in *Thomas v. Joslin,* 36 Minn. 1, 29 N. W. 344, in this language: "It was properly held" there, said the court, ". . . that plaintiff was estopped, having elected to stand trial in the first action on the incomplete contract."

We have discussed at some length *Washburn v. Great Western Ins. Co.* 114 Mass. 175, and the cases based thereon, since it seemed that if they were rightly grounded on the doctrine of election or that of *res adjudicata* they might be decisive on this appeal. We do not think that they were, neither do we think that as vindications of the doctrine of estoppel *in pais* they should influence the decision here. Doubtless, if a person with knowledge of the facts invokes a judicial remedy upon one theory, as regards a particular subject-matter,—for example, that it produced a contract of one character,—and compels his adversary, at considerable expense, to successfully defend against such theory, it would be inequitable, at least, to permit such person to again use a judicial remedy, though consistent with the other, to recover on a different cause of action than at first alleged,—one not affected by the doctrine of *res adjudicata* or the election of remedies, but proceeding upon the theory that the transaction in question produced a contract differing somewhat from that first alleged. The defendant might, in some circumstances, invoke the equitable principle of estoppel *in pais* against the vexatious litigation, but we cannot discover that there was any such situation here. The action commenced by the bank upon the four-year note was instituted and prosecuted upon the theory that the facts now relied upon as a ground for relief, entitled the holder of the note to legal relief upon a contract of guaranty. There has been no change of position by the plaintiff, as regards the facts. It having been decided in the legal action that they were not sufficient to make a guaranty good at law, he invoked equity to grant

such relief as it can afford, in view of the evident purpose of the parties to make such a guaranty.

What has been said sufficiently answers the contention of counsel for respondent that the commencement of the action on the four-year note was an election of remedies. There is much inaccurate language in authorities on this subject. A mere election of remedies, where there are several, does not waive others. *Barth v. Loeffelholtz,* 108 Wis. 562, 84 N. W. 846. It is only where, as before indicated, there are several remedies which are inconsistent that the choice of one waives the rest. Such inconsistency is to be looked for in the relation between the parties which the different remedies suggest. If one sues for damages for breach of or to otherwise recover on contract corresponding relations are necessarily alleged or implied to exist, while, if growing out of the same transaction, that one sues to recover property parted with to the defendant on contract a termination of contractual relations by rescission is suggested. In one case a subsisting contract is assumed or alleged, in the other absence thereof is necessary. Failure to note the true test of whether the doctrine of election applies or not has led to so many instances of improper references thereto that great care must be exercised in the selection of judicial guides in a given situation or one will be liable to go astray. Where more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one the others to all intents and purposes no longer exist. Where more than one remedy exists to deal with a single subject of action, but they are not inconsistent, nothing short of full satisfaction of the plaintiff's claim waives any of such remedies. All may be pursued concurrently, even to judgment, but satisfaction in one reaching the whole claim is a satisfaction in all. Where only one remedy exists, but the plaintiff asserts one which he does not in fact possess, the proper remedy is not waived. In a late work the author rightly remarks

that the "test seems easy of application, yet the fact has not prevented confusion and a degree of contradictions in reported cases." It will not do to take it for granted that when election of remedies is spoken of in a judicial opinion, the principle that the selection of one remedy waives the use of all others was involved. 7 Ency. Pl. & Pr. 363.

The purpose of the action on the four-year note was to vindicate the rights of appellant as to the subject-matter in question by recovering on contract. The transaction claimed at first is identical with that claimed now. The fact that in one case it was claimed that it created a contract good at law and in the other one good in equity, or that the failure to create, as was intended, a contract good at law or in equity, created obligations of equivalent dignity in equity, does not satisfy the rule that a choice of one remedy waives the others. It is by no means uncommon to bring an action upon a written contract, and upon its subsequently appearing that the writing was not made as intended by both parties, to invoke equity jurisdiction to reform and enforce it as perfected. *Wisconsin M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777, is a significant instance thereof.

If there were no other answer to the suggestion that the commencement of the first action waived all other remedies against Smith, or his personal representative, a conclusive one would be found in the fact that if any effective remedy at all existed for appellant it was to be found in equity, while the one chosen was at law. As before indicated, it is a cardinal principle of the doctrine of election that it is to be applied only where there is opportunity to choose between two or more remedies which are appropriate.

The doctrine of laches is invoked by respondent in support of the judgment. Delay in a case like this evidencing acquiescence or that no mistake was in fact made is one thing, while delay to insist upon one's rights as to a mistake known to exist is quite another. The former is not claimed

in this case. Delay, under some circumstances, is as efficient to extinguish the right as the statute of limitations, but in itself it is ineffective as a defense. It is not a bar in equity when it would not be at law, in the absence of circumstances rendering the late assertion of the right so prejudicial to the adverse party that it would be inequitable to permit it to be done successfully. *Kropp v. Kropp,* 97 Wis. 137, 72 N. W. 381. There was no unreasonable delay here. This action was commenced promptly after the termination of the one at law, which irrevocably established as a fact that the remedy first asserted was inappropriate, even if the facts were as alleged.

The point is made that if there was a mistake in reducing the verbal agreement to guaranty the notes to writing, it was one of law and hence irremediable. A mistake of law as well as of fact may, in some circumstances, be remedied. The general statement often indulged in that equity may relieve one from the consequences of a mutual mistake of fact, but not from a mistake of law, is very misleading. Error as to the sufficiency of language to put in legal form a transaction upon which the minds of two parties have met, may be as effectually dealt with as one purely of fact. Upon due consideration in *Wisconsin M. & F. Ins. Co. Bank v. Mann, supra,* the rule was stated thus:

"A mistake in the contract itself, springing from ignorance of the law, is one thing, and mistake in the legal meaning attributable to the words used to express a contract is quite another. . . . Where there is a mutual mistake, either of fact in making a contract, or of law or fact in the reduction of the contract to writing, the person injured thereby may have it reformed in equity in accordance with the truth, in the absence of facts or circumstances constituting a waiver of the remedy or an estoppel to the assertion of it."

To the same effect are *Green Bay & M. C. Co. v. Hewitt,* 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; *Silbar v. Ryder,* 63 Wis. 106, 23 N. W. 106; *Whitmore v. Hay,* 85 Wis. 240,

55 N. W. 708; *Beardsley v. Knight,* 10 Vt. 185; 2 Pomeroy, Eq. Jur. (2d ed.) §§ 843–845.

We now come to the question of whether a mistake in reducing to legal form a mere collateral promise to answer for the debt, default or miscarriage of another it relievable by the equitable remedy for reformation or specific performance. The finding that the corporate stock was sold and transferred to Goodrick upon the faith of Smith's agreement to guaranty payment of three fifths of the purchase price thereof is urged upon our attention. As an original matter, we should say that comes far short of finding that the performance by appellant of the main contract was beneficial to Smith, so as to render the transaction between them independent of that between the former and Goodrick, satisfying the rule declared in *Commercial Nat. Bank v. Smith,* 107 Wis. 574, 83 N. W. 766, or to suggest that there was fraud in fact or in law in the failure of Smith to execute a valid guaranty. The distinction between a purely collateral undertaking, which is within the statute of frauds, and an original promise which may also be secondarily collateral to another, but is, nevertheless, without the statute, is well stated in Stearns, Law of Suretyship, § 39, in these words:

"A distinction must be made, however, between a beneficial consideration, which is a mere inducement to enter into the suretyship contract, and a beneficial participation in the main contract. It is the latter only which takes the case out of the statute. The promisor may receive a money consideration for his promise, or he may be induced to make the contract for other valuable considerations beneficial to him, yet it will be void if not in writing, but if the performance of the main contract, to which his suretyship is collateral is a benefit to him, a verbal promise in guaranty is sufficient."

Illustrations of the application of that principle are found in the following cases: *Dyer v. Gibson,* 16 Wis. 557; *Houghton v. Ely,* 26 Wis. 181; *Hutson v. Field,* 6 Wis. 407; *Borchsenius v. Canutson,* 100 Ill. 82; *Fears v. Story,* 131 Mass.

47; *Bluthenthal v. Moore,* 106 Ga. 424, 32 S. E. 344; *Davis v. Patrick,* 141 U. S. 479, 12 Sup. Ct. 58. But, as we have heretofore indicated, if there were any doubt as an original proposition as to whether appellant's promise was collateral and within the statute of frauds, that doubt could not be resolved in favor of appellant, whatever construction might be put upon the findings of the trial court, since the former adjudication of the matter is conclusive in favor of the respondent. We should not have discussed the matter at all, other than to show that it was covered by such adjudications, were it not for the fact that it is made quite prominent in appellant's argument.

So, as before stated, the case comes down to this one proposition: Can a defectively written purely collateral promise to answer for the debt, default or miscarriage of another, by interference of a court of equity,—there being no question as to what the facts are and that the minds of the parties met on all the essentials of a verbal promise to make a valid guaranty, but through mutual mistake, without any element of fraud, they failed to embody it in the writing,—be reformed so as to make the same satisfy the statute of frauds? Or can, in such a case, a court of equity interfere and compel specific performance of the verbal agreement to make a valid guaranty?

It will not do to hold that the mere delivery of the consideration as between the original parties to the contract, though sufficient to support a guaranty, if one be properly made, is a part performance of a verbal contract to make a valid guaranty, taking the latter out of the statute of frauds, under the familiar principle that where relations between parties to a verbal agreement required to be reduced to writing to satisfy the statute of frauds and so give it validity, have so far ceased to be executory as to one party thereto that it would operate as a fraud upon him to permit the other to successfully put up the statute of frauds as an excuse for nonperformance,—a

court of equity, while respecting the statute, will lay its hands upon that other and enforce obligations deemed to have been created by the circumstances not within the statute, but resting upon him in good conscience with a corresponding equitable remedy to give them vitality; that equity thereby may leave the statute of frauds intact, yet satisfy the ends of justice by avoiding the injurious consequences that would, or might, otherwise flow from the mistake. It would take much time and require a very broad field to be explored to define the precise boundaries to which such obligations are deemed to be cognizable by a court of equity, so that, while respecting the statute of frauds, it can prevent its being used to accomplish the very purpose it was designed to avoid. That it cannot be carried so far as to entirely nullify the statute would seem not to be open to question. Courts of equity have been accustomed to take great liberties, and probably seldom too great, in this matter, but they have never gone so far but that in each instance it was at least assumed that the real policy of the statute was left intact.

The growth of equity in the line under discussion, while very rapid at first, has not perceptibly advanced in recent years. Many judicial warnings may be found in the books against any further development of the idea that the statute of frauds may be "uplifted," so to speak, and the consequences of noncompliance with it thereby be avoided, pointing to instances where it was thought it had already been extended to the danger line, if not beyond, and suggesting that to further extend it would, in effect, avoid it altogether.

While it is true that equitable principles never necessarily remain stationary, that they may advance, from time to time, as the exigencies of new situations seem to demand, to the end that justice may not fail of vindication, probably it is true that the needs of such a situation, affecting the statute of frauds or limitations, should be of an extraordinary nature to justify a court in creating an essentially new precedent.

In that regard such statute is quite as securely intrenched as that of limitations. Regarding the latter it has been held that if one is merely betrayed into ignorance of his rights as to another by wrongful conduct of the latter until the time shall have expired for him to invoke judicial remedies to vindicate the same, such other is not thereby estopped from pleading the limitation period in respect to the matter; that standing upon his statutory rights he may safely confess his misconduct and defy his adversary in any judicial forum. *Pietsch v. Milbrath, post,* p. 647, 101 N. W. 388; *Bank of Hartford Co. v. Waterman,* 26 Conn. 324. That fraud may go so far, however, as to any cause of action as to call for equitable protection against the consequences of the statute of limitations or frauds, is recognized in some jurisdictions. *Holloway v. Appelget,* 55 N. J. Eq. 583, 40 Atl. 27; Fry, Specific Performance, § 552. But that is not here.

The conflict in authorities as to how far equity power may interfere to protect one from the consequences of non-compliance with the statute of frauds is well indicated in 2 Pomeroy, Eq. Jur. §§ 864–867, and note on *Glass v. Hulbert,* 102 Mass. 24; *Petesch v. Hambach,* 48 Wis. 443, 4 N. W. 565. It is commonly said that "the statute is intended to prevent frauds and not to promote them," and therefore courts will not give effect to efforts to turn the intended beneficent instrument into one with which to perpetrate injustice. *Lex nemini facit injuriam.* So far as that may legitimately go, the principle is one of inestimable value in judicial dealings with the affairs of men. True, the statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong, but in testing that principle by the proper limitations of the words "justice" and "wrong" the function of the legislature must be respected as to what is right. That which, operating in its proper sphere of action, the legislature has proclaimed to be right, must not be declared to be wrong with a corresponding remedial right

in a judicial sense. It having unqualifiedly stated that delay for a specified period of time after a cause of action shall have accrued to enforce it, shall be deemed to have extinguished it, the courts cannot legitimately ingraft exceptions upon the enactment. If the consequences in any given case are avoidable it must be one where that can be done and the statute be left really inviolate. Courts must regard wrongs not remediable because of the statutes as not wrongs at all, at least of any greater dignity than those breaches of moral obligations which must always be left to be redressed in other ways than by judicial tribunals, they not being within the maxim: "There is no wrong without a remedy."

Counsel for appellant refer to authorities where there was part performance after the execution of the defective agreement, or where on the faith of it at the time of the execution thereof one party thereto parted with value to the other, and subsequently a court of equity exercised its authority to prevent the consequences that would otherwise flow from the failure to put the agreement in suitable form. In all such cases there are special circumstances referred to held sufficient to take the case out of the statute. To make those authorities, which, of course, announce a very familiar principle, fit this case in any view that can be taken of it, we must be able to find special circumstances warranting the application thereof. There are none which we can discover. The verbal agreement, if we are to fall back on that, and the writing are so closely connected with each other and blended into one transaction as to be inseparable. Whatever was done on the faith of one was grounded on the other. Whatever was done by appellant occurred as truly after the defective writing was made as after the agreement to make the writing. One was as infirm as the other, both at law and in equity. No consideration moved directly or indirectly to Smith, nor was any fraud, in fact or in law, perpetrated by him or could result from his acts, such as is commonly held sufficient to create an

equitable obligation not affected by the statutes. So we have a clear case where by the policy of the statute it is conclusively presumed that the promisor did not intend to bind himself, and that the promisee has no reason to complain of his refusal to be bound, there being no evidence to the contrary created in the manner provided by law.

If we could treat the verbal agreement to make a valid guaranty as separate from the writing, as before incidentally suggested, we would yet face the fact that the former is void because there was no circumstance rendering it a fraud in Smith not to perform it, so as to take it out of the statute. An agreement to make a collateral promise is as much within the statute as the promise agreed upon would be, if imperfectly reduced to writing. *Wills v. Shinn,* 42 N. J. Law, 138; *Dee v. Downs,* 57 Iowa, 589, 11 N. W. 2; *Carville v. Crane,* 5 Hill, 483; *Bushell v. Beavan,* 1 Bing. N. C. 103; *Whitchurch v. Bevis,* 2 Brown, C. C. 565; *Wood v. Midgley,* 5 De G., M. & G. 41; De Colyar, Guaranties, 59. This language is used on the subject in the work last cited:

"It has also been made the subject of discussion whether or not a promise to give a guaranty (as distinguished from a promise to procure one) is a special promise which falls within the statute. It is, however, obvious that a promise to give a guaranty at a future time entirely falls within the mischief which the enactment was intended to guard against, and, indeed, that if the statute could be evaded by making such a promise it would be useless."

The author quotes from the opinion of POLLOCK, C. B., in *Mallett v. Bateman,* L. R. 1 C. P. 163, as follows:

"If we were to hold that a contract of guaranty must be in writing but that a contract to give a guaranty need not, we should, I think, be committing the same mistake as our predecessors did with reference to the statute of uses. . . . Whether the decision of the courts of equity as to uses and trusts were beneficial or not I do not stop to inquire, but undoubtedly the whole doctrine arose out of a desire to frustrate

the intention of the statute of uses. I trust that we shall not commit a similar mistake in construing the statute now under consideration."

In Fry on Specific Performance of Contracts, at section 552, the use of equity jurisdiction to compel performance of a verbal agreement to make a guaranty in writing is spoken of thus:

"Such a procedure affords a most easy means of evading the intention of the statute, and introducing the mischief it was designed to remedy. . . . After a parol contract, a refusal to sign a written one is no fraud of which the court can take cognizance."

It should be remarked in passing that the author was then endeavoring to define the limits of the doctrine,—having, of course, no application to this case,—that when the want of a writing is due to fraudulent prevention thereof by the person seeking to take advantage of the circumstances, he is estopped from obtaining such advantage. The general conclusion of the author is that the mere refusal to carry out a verbal agreement to execute a contract in writing good under the statute of frauds creates no remedial right in favor of the party to whom the agreement was made. That being so it certainly could create no such right in favor of a collateral promisee, who parts with nothing at the time of the promise nor is expected to thereafter to the collateral promisor. Nowhere is it suggested by the author, or by any one who has written on the subject, so far as we are able to discover, that failure to reduce a verbal agreement to writing, not characterized by fraudulent inducement or mistake, or by other special circumstances accompanied by such change of position on the part of the promisee beneficial to the promisor by part performance within the rule on that subject—that a failure to fully perform would work a fraud on him and be a fraud in the promisor.

In considering this subject we must not lose sight of the

fact that equity never interferes to give one immunity, as to any transaction, from the consequences of the statute of frauds, unless those consequences would be not only a fraud upon one but a fraud in the other party to the transaction. Fry on Specific Performance of Contracts, § 557. So the whole doctrine as to part performance taking a transaction that would otherwise be within the statute of frauds out of it is based on the idea that the party seeking to shield himself behind the statute obtained something of value, and his adversary parted with it to him after the completion of the agreement and on the faith of it. That could never occur ordinarily as to mere personalty so as to call into activity equity jurisdiction to avoid the otherwise consequences of the statute of frauds, since the part performance of itself would take the transaction out of the statute by creating a legal liability. Sec. 2308, Stats. 1898; Pomeroy on Contracts, sec. 100. From the fact that one who hides, so to speak, behind the statute of frauds, at law obtains title by force of such statute to something of value without rendering a just equivalent therefor, or being amenable to any legal remedy, springs the obligation on the one side and the corresponding equitable remedy on the other. The principle has nowhere been more accurately and understandingly defined than by Lord WESTBURY in *McCormick v. Grogan,* 4 H. L. 97, in these words:

"The court of equity has from a very early period decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes on him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds."

So here we find entirely absent the prime essential of part performance upon which the appellant's case is assumed to be

grounded. Of course, part performance by Smith in that he made a good guaranty on one of the notes when requested to some time after the making of the defective paper, does not count. A mere acknowledgment by one entitled to the protection of the statute of the existence of a void obligation by partly performing it does not render further performance a fraud upon the promisee in any sense. Mere part performance as between the parties to the principal contract could not be held to take the collateral contract of suretyship out of the statute without nullifying it, because that necessarily occurs in every case where the original promisee acts at all. *McGaughey v. Latham,* 63 Ga. 67. Said an eminent writer respecting the equitable doctrine of part performance of contracts of the kind under consideration, "There is no occasion or opportunity either for the equitable relief of specific execution, or the doctrine of part performance." Pomeroy, Contracts, sec. 100.

We have not found it necessary in reaching a conclusion to consider whether an agreement of the sort here could, under any circumtances, be deemed in equity to have been taken out of the statute. Doubtless, in the main, at least, the doctrine in that regard is confined to contracts relating to lands (Pomeroy on Contracts, sec. 101), and those which a court of equity would entertain a suit for specific performance of if they were in statutable form. Sec. 2305, Stats. 1898, refers only to such contracts and was doubtless supposed at the time of its enactment to cover those which courts of equity had been accustomed to deal with, saving parties, where necessary to prevent injustice, from the consequences of the statute of frauds. That does not prevent the same equitable principle from being applied to other situations, as the cases indicate that it has, but it suggests caution in the development thereof in going beyond the boundaries of precedent. The maxim *"Lex deficere non debet in justitia exhibenda"* (the law ought not to fail in showing justice), which is the guiding principle of equity and

in harmony with which the doctrine was evolved, that when a situation is met with where the application of the statute would give one a right to the fraudulent despoliation of another, it may be deemed "uplifted" that an obligation springing from the relations of the parties and assumed to be outside of the statute may be enforced and injustice be thereby prevented, cannot be carried so far as to really nullify the statute without entering upon the broad field of judicial usurpation. The boundary would be crossed by equitable interference to give vitality to a mere collateral promise of suretyship in which there was no consideration moving to the guarantor supporting the equitable remedy of reformation, or special circumstances supporting other equitable relief.

We have not discussed specifically the subject brought to our attention, of whether by the equitable remedy for reformation, a contract of guaranty, so called, not a contract at all, because, though in writing, not containing the statutory essentials, can have those essentials placed therein by a judicial decree. If it could, the statute would seem to have little force. Certainly any circumstance that would justify such an exercise of judicial authority would justify the use of the remedy for specific performance. *Petesch v. Hambach,* 48 Wis. 443, 4 N. W. 565. As we have found, the facts here will not support the former remedy, it seems plainer still they will not support the latter.

It follows that in any view that can be taken of this case the judgment appealed from cannot be disturbed.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

WAUSAU TELEPHONE COMPANY, Respondent, vs. UNITED FIREMEN'S INSURANCE COMPANY and others, Appellants.

December 13, 1904—January 10, 1905.

Fire insurance: Standard policy: Additions to terms of policy: Electricity

The Wisconsin standard fire policy, which is also a statute, provides in sec. 1941—43, Stats. 1898, that the insurance company "does insure . . . against *all* direct loss or damage by fire except as hereinafter provided." Such policy and statute, in secs. 1941—47, 1941—49, contain certain exceptions to the liability of the insurer, including lightning, but provide that liability for direct damage by lightning may be assumed "by specific agreement hereon." Such policy and statute prohibit (sec. 1941—64) the making or attaching of any additional provision, agreement, condition, or clause as part of the policy, except, among other things, "printed or written forms of description and specification or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts and conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for)." *Held*, that a clause, in addition to the clauses of the standard policy: "This insurance does not cover any loss or damage to property caused by electric current, whether artificial or natural," cannot be added to such policy.

APPEALS from judgments of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Kreutzer, Bird & Rosenberry,* and oral argument by *C. B. Bird.*

For the respondent there was a brief by *Ryan, Hurley & Jones* and *Neal Brown,* and oral argument by *T. C. Ryan.*

WINSLOW, J. This is an action against four insurance companies upon as many standard policies to recover for the destruction by fire of the plaintiff's switchboard in its tele-

struction would be almost, if not quite, ridiculous. These considerations make any further discussion of the case unnecessary.

By the Court.—Judgments affirmed.

MEYER, Respondent, vs. MEYER, imp., Appellant.

December 13, 1904—January 10, 1905.

Bastardy: Pleading: Demurrer: Cause of action: Legal capacity to sue: Defect of parties: Separate estate of married woman: "Property": Trusts and trustees: Beneficiaries' right to sue: Public policy: Statutes: Waiver: When action accrues.

1. Defendants, as principal and surety, gave plaintiff a bond which recited the arrest of the principal on a charge of bastardy upon the plaintiff. The recited consideration of the bond was the withdrawal and abandonment of such proceedings, and an agreement of marriage with and support of the prosecutrix. The condition of the bond was, in case the principal should fail to perform, that payment should be made to the county judge. The bond further provided that in case the amount to be paid for the support of the prosecutrix could not be agreed upon by the parties, the amount should "be determined by the aforesaid county judge, and shall be furnished and paid in the manner and way he may designate." In an action against the obligors on such bond the complaint was silent as to whether the plaintiff was or was not a married woman. On demurrer for legal incapacity to sue because plaintiff was a married woman, *held:*

   (1) The court could not assume, because the bond recited that the bastardy proceedings were agreed to be discontinued in consideration of an agreement to marry, that such agreement had been consummated.

   (2) Even if plaintiff were a married woman, the beneficial right under the bond was her sole and separate property, in regard to which, under sec. 2345, Stats. 1898, she is expressly authorized to sue in her own name.

   (3) Even if plaintiff were a married woman, the husband was the adverse party, in which situation she is expressly authorized to sue in her own name. (Sec. 2608, Stats. 1898.)

2. In such case, there was no defect of parties, since if it is true that the plaintiff only has a beneficial interest in the bond, while the legal right to sue on it is in the county judge, the error goes to the cause of action, not to a defect of parties plaintiff.
3. In such case, the county judge is the trustee of an express trust, and, in the absence of allegation of neglect or failure of the county judge to perform the duties imposed by the bond, such complaint is fatally defective as not stating a cause of action.
4. In such case, the fact that plaintiff is beneficially interested in the execution of the trust, does not make her the real party in interest, within the meaning of sec. 2607, Stats. 1898.
5. A trust fund provided to secure the support of a married woman is property in the true sense of the term, although it be in such form that the beneficiary cannot assign, or convey, or devise it, or use it in any manner otherwise than that specified in the terms of the trust.
6. A bond, given in settlement of a bastardy proceeding, conditioned for the support of the prosecutrix and her child in consideration of the discontinuance of the proceeding, is not against public policy, since by sec. 1532, Stats. 1898, the proceeding is one proper for settlement by contract involving the discontinuance of the prosecution.
7. A bastardy proceeding is neither a civil nor criminal action, strictly speaking, but is a mere statutory proceeding.
8. The provisions of sec. 1532, Stats. 1898, requiring, in bastardy proceedings, official approval of the settlement with the mother as a prerequisite to the right of the accused to his discharge, is designed for the protection of the injured female, not of the public.
9. A settlement of a bastardy proceeding, made by the accused, without the official approval required by sec. 1532, Stats. 1898, is a waiver by him of the statute, and also by the woman, so far as she is competent in that regard.
10. A bond, given in settlement of a bastardy proceeding, conditioned for payment unless the prosecutrix and defendant "shall live together as husband and wife," is not a contract for a voluntary separation.
11. Where a bond, given in settlement of a bastardy proceeding, provided that "the amount to be paid (the prosecutrix), if the same cannot be agreed upon by the parties hereto, shall be determined by the county judge, and shall be furnished and paid in the manner and way he may designate," no right of action matures until the county judge makes his determination.

APPEAL from an order of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

The substance of the complaint was as follows:

July 21, 1903, defendant William Meyer, as principal, and *Andrew* as surety, executed and delivered to the plaintiff an instrument in the following form:

"Whereas, William Meyer, of the county of Waupaca, State of Wisconsin, has been arrested and charged with seduction and bastardy upon one *Gertrude Meyer,* of the county of Waupaca, State of Wisconsin, committed on the 27th day of November, A. D. 1902.

"And whereas, in consideration of the withdrawal and abandonment of said proceedings, said William Meyer, for himself, his heirs, executors and assigns, hereby consents and agrees to marry said *Gertrude Meyer,* and support her, and any family they may have, for a period of four years, commencing from the date hereof;

"And said William Meyer, his heirs, executors and assigns, as principal, and *Andrew Meyer* for himself, his heirs, executors and assigns, as surety, do, jointly and severally agree to support and care of said *Gertrude Meyer* during the said period of four years from date;

"And in case of the failure of said William Meyer, as principal, and *Andrew Meyer,* surety, to support said *Gertrude Meyer,* and the said family, they, each and severally, hereby agree to pay to the county judge of Waupaca County, aforesaid, the sum of Five Hundred Dollars, or so much thereof as may be necessary to be used for the support of said *Gertrude Meyer* and said family, during the balance of said period of four years.

"The support of the said *Gertrude Meyer,* and the amount to be paid her, if the same cannot be agreed upon by the parties hereto, *shall be determined by the aforesaid county judge, and shall be furnished and paid in the manner and way he may designate,* but not to exceed the sum of One Hundred and Twenty-five Dollars in any one year, *except the first,* which shall be determined by said county judge, if need be, said payments to be made in cash installments, monthly, unless said *Gertrude Meyer* and William Meyer shall live together as husband and wife.

"In witness whereof, the said William Meyer, principal, and *Andrew Meyer,* surety, have hereunto set their hands and seals this 21st day of July, A. D. 1903.

"WILLIAM MEYER, Principal.
"ANDREW MEYER, Surety.
"GERTRUDE MEYER.

"In presence of
"LLEWELLYN COLE,
"CONRAD MEYER."

The defendant William Meyer has failed to comply with the provisions of such instrument in that he has refused to support plaintiff *Gertrude Meyer* and her child, otherwise than by payment to her of $10 July 28, 1903, on which date said defendant abandoned the plaintiff and since which time he has not visited her nor in any manner contributed to her support or the support of her child. Said defendant *Andrew Meyer* has failed to comply with the conditions of such instrument and refused to do so, otherwise than by the payment to plaintiff of $15 October 1, 1903, and $10 November 20, 1903.

August 19, 1903, a child was born to plaintiff and said William Meyer. She has incurred expenses necessary to the support of herself and child since the making of the said instrument, to the amount of $100. She has exhausted all her means in caring for herself and child and is now unable to work and support either herself or the child. She has repeatedly requested defendants to comply with the conditions of the aforesaid agreement, but they have neglected and refused to do so, except as aforesaid. By reason of the breach of said agreement on the part of defendants, plaintiff has sustained damages to the amount of $500. She demands judgment requiring defendants to pay to the county judge of Waupaca county, Wisconsin, $500, to be used for the support of herself and her child, according to the terms of said agreement, and judgment for costs and disbursements in this action, and such other and further relief as may be just.

Defendant demurred on three grounds, viz.: 1. Want of legal capacity to sue. 2. A defect of parties plaintiff, in that if there be a cause of action upon the instrument described in the complaint, it is in favor of the county judge of Waupaca county, Wisconsin. 3. For failure to state facts sufficient to constitute cause of action.

The demurrer was overruled generally with leave to answer within thirty days on payment of $10 costs. Defendant *Andrew Meyer* appealed.

For the appellant there was a brief by *George Hoxie,* attorney, and *Kreutzer, Bird & Rosenberry,* of counsel, and oral argument by *C. B. Bird.*

For the respondent there was a brief by *Olen & Olen,* and oral argument by *O. L. Olen.*

MARSHALL, J. Several questions are presented by appellant's counsel for consideration. An affirmative answer to either of them will be sufficient to condemn the complaint on one of the grounds of demurrer insisted upon. We will state *verbatim*, or in effect, each of counsel's propositions, and consider the same.

1. Has plaintiff legal capacity to sue in view of the disabilities of married women?

The first answer thereto is, the complaint is entirely silent as to whether the plaintiff is or is not a married woman. Appellant's counsel assume, because the bond recites that the bastardy proceedings were agreed to be discontinued in consideration of an agreement on the part of defendant, William Meyer, to make the plaintiff his wife, that such agreement was consummated. That does not follow. If the marriage agreed upon occurred it is very strange that counsel omitted to plead it in some way. The second answer to the question is, conceding that plaintiff is a married woman, the beneficial right under the bond is her sole and separate property in regard to which she is expressly authorized by statute to sue in

her own name. Sec. 2345, Stats. 1898. The third answer, making the concession as before, is that the husband is an adverse party, in which situation a married woman is expressly authorized to sue in her own name by sec. 2608, Stats. 1898.

2. Is there a defect of parties plaintiff, in that a cause of action upon the bond, if any there be, is in favor of the county judge as trustee of an express trust?

The answer to that is, if it be true that respondent only has a beneficial interest in the bond, while the legal right to sue on it is in the county judge, the error in proceeding upon an inconsistent theory goes to the cause of action, not to a defect of parties plaintiff. If, as appellant contends, the bond in effect runs to the county judge as trustee of an express trust, then, of course, he is the holder of the legal title to the trust fund,—is the proper party to sue to recover the same and without joining with him the respondent. Sec. 2607, Stats. 1898. A *cestui que trust* cannot sue to enforce a trust, except in case of necessity, by reason of failure, or refusal, or inability of the trustee to perform his duty in that regard. In that case the trustee is a necessary party, and a failure to make him such renders the complaint open to attack for defect of parties. Obviously the pleader did not proceed on that theory as the complaint is silent as to any reason why the action was brought in the name of the *cestui que trust.*

3. Does the complaint state facts sufficient to constitute a cause of action?

On that subject several points are made by counsel.

(a) No cause of action is stated in favor of the plaintiff or any one because the legal title to proceed upon the bond, if there be any, is in the county judge. We see no escape from that proposition. The meaning of this language is unmistakable:

"In case of failure of said William Meyer, principal, and *Andrew Meyer,* surety, to support the said *Gertrude Meyer* and the said family, they each and severally agree to pay to

the county judge of Waupaca county, aforesaid, the sum of five hundred dollars, or so much thereof as may be necessary," etc.

The evident purpose of the instrument was to make the county judge the trustee of the fund mentioned therein, with the right to call the same in for disbursement for respondent's benefit, as in his judgment that might be deemed proper. The whole sum of $500 was not promised to be paid absolutely, but only "so much thereof as may be necessary, to be used for the support of said *Gertrude Meyer,*" etc. To be used by whom? By the county judge, manifestly. Therefore he was not only expected to ask for, receive and recover the fund, but active duties on his part of a discretionary character were contemplated, viz.: To determine the amount and manner in which the fund should be used for the benefit of respondent.

Few principles are better understood than the one above adverted to, viz.: That the trustee of an express trust only can sue to defend or recover the trust fund, except where he neglects or refuses to perform his duty in that regard, and then the *cestui que trust* may sue, joining the trustee as plaintiff or defendant, as the case may require. As plaintiff, generally speaking, but when he is adversely interested or refuses to let his name be used, then as defendant. Since there is no allegation in the complaint, as before indicated, as to why respondent instituted the litigation, the complaint is fatally defective. The fact that she is beneficially interested in the execution of the trust does not, by any means, make her the real party in interest, within the meaning of the statute. In contemplation of law the trustee of an express trust is primarily the interested party. Before the Code he could sue in his own name, joining the *cestui que trust.* By force of the statute he is the proper party to bring the action, without joining those secondarily interested.

(b) The marriage of the parties extinguished any liability on the bond.

We may well suggest, for all that is stated in the complaint, there was no marriage. Moreover, by sec. 2341, Stats. 1898, a married woman does not, by entering into the matrimonial contract, lose to her husband the property she then possesses, or any part thereof. Counsel for appellant suggest that the word "property" as used in such section does not include a beneficial interest in a trust fund of the nature of the one in question because it does not fall within the restricted meaning of such word, given thereto in *Gibson v. Gibson,* 43 Wis. 23. There the court said that property, under the married women's act, refers only to "things which may be held, used, assigned, conveyed and devised." The force counsel attribute to the quoted expression is in the use of the conjunctive, suggesting that nothing is property, within the meaning of the statute, unless it has all the characteristics named,—unless, in the hands of the person possessing the same, it is susceptible of being "held, used, assigned, conveyed and devised." We may safely say there was error in thus joining the terms by the conjunctive. Things that may be held and enjoyed are no less property because they cannot be by the possessor "sold, assigned and devised." Substitute the disjunctive for the conjunctive in the language relied upon and it will then doubtless express the idea the court intended to convey. That seems clear upon reading the opinion on rehearing, by RYAN, Chief Justice. It is there distinctly held that the term "property" in the section under consideration includes everything covered by that term according to the statutory construction thereof in sec. 4972,—that it includes money, goods, chattels, things in action, evidences of debt and real property, but not a mere right of action, as for instance one to recover compensation for damages for defamation of character,—to recover something which when obtained will

answer to one of the species of property mentioned. With that explanation, if any were necessary, there can be no doubt but that a trust fund provided to secure the support of a woman and her family is property in the true sense of the term, though it be in such form that the beneficiary cannot "assign, or convey or devise" it or use it in any manner otherwise than that specified in the terms of the trust.

(c) The bond is against public policy.

So far as that suggestion is based on the theory that the instrument was given to secure immunity from prosecution for the crime of seduction, it needs no attention since it clearly appears not only by the instrument, but by the allegations in regard thereto, that the consideration thereof was the settlement of respondent's claim against her paramour in a bastardy proceeding, which by the policy of the statute is one proper for settlement by contract involving the discontinuance of the prosecution instituted by the woman. Sec. 1532, Stats. 1898.

True, the section referred to entitles the accused person in such a proceeding to his discharge only upon doing something more than merely to satisfy the demands of the prosecutrix, but that does not militate against her abandoning the proceedings, so far as she can, in consideration of receiving satisfaction from him.

A bastardy proceeding is neither a civil nor criminal action, strictly speaking, but is a mere statutory proceeding designed, primarily, to enable the injured female to recover of the person who, in the eye of the law, has committed a grievous injury to her, compensation therefor. *Baker v. State,* 56 Wis. 568, 14 N. W. 718; *Id.,* 65 Wis. 50, 26 N. W. 167; *Pierstoff v. Jorges,* 86 Wis. 128, 56 N. W. 735; *Barry v. Niessen,* 114 Wis. 256, 90 N. W. 166. In *Pierstoff v. Jorges, supra,* it was insisted that equity should not lend its aid to coerce the defendant into paying a judgment rendered against him in a prosecution for bastardy because the prose-

cutrix was a partner with him in crime. The contention was condemned as clearly unsound because in the eye of the law in such a case the wrongdoer is the father of the illegitimate child, and the wronged party the mother, not the public, and the statute was designed to afford her a right of action for her own benefit and protection. In *Barry v. Niessen, supra,* the court said:

"The action is not in effect a criminal prosecution, but one instituted by the mother as a proceeding to enforce the father's natural obligation to support his child, and for the benefit and protection of the mother."

In view of the foregoing the contention that the agreement in suit is void, as against public policy, clearly has no merit whatever. The provision of the statute requiring official approval of the settlement with the mother as a prerequisite to the right of the accused to his discharge, was designed for the protection of the injured female, not of the public. The purpose was to prevent the accused from intensifying the injury already inflicted upon the mother by inducing her to agree to an improvident settlement. However, a settlement, made by the accused, without such approval, is a waiver by him of the statute, and also by the woman, so far as she is competent in that regard. In any event it is no violation of public policy that can be invoked by the accused to defeat his agreement.

In *Knight v. Priest,* 2 Vt. 507, a settlement was made substantially as in this case. The mother agreed that the accused should be prosecuted no further. He was prosecuted, nevertheless, by the town and compelled to give bonds. The point was made in a suit upon the note given by him in settlement of the mother's claim that the consideration therefor had failed. The defense was rejected, the court holding that it was competent for the woman to settle with the wrongdoer for the injury to her, and that her agreement not to further prosecute him was no more than one that *she* would not fur-

ther prosecute; and that the further prosecution by the town, which she could not control, was no breach of the agreement.

Such settlements, as has well been said on many occasions, are not only dictated by the highest sentiments of honor and duty but are in entire harmony with the policy of the statute. They recognize not only a legal, but a high moral obligation on the part of the wrongdoer to repair as far as practicable the injury done by him and should be, and are, viewed by courts with high favor, rather than disfavor, as the following citations will abundantly show: *Colenan v. Frum*, 4 Ill. 378; *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 276; *Merritt v. Flemming*, 42 Ala. 234; *Nicewanger v. Bevard*, 17 Ind. 621; *Haven v. Hobbs*, 1 Vt. 238; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Davis v. Moody*, 15 Ga. 175; *Comm. v. Turner*, 4 Dana, 511; *Burgen v. Straughan*, 7 J. J. Marsh. 583; *Comm. v. Davis*, 6 Bush, 295; *Baker v. Roberts*, 14 Ind. 552; *Black Hawk Co. v. Cotter*, 32 Iowa, 125; *Maxwell v. Campbells*, 8 Ohio St. 269; *Kezartee v. Cartmell*, 31 Ohio St. 522; *Hook v. Pratt*, 78 N. Y. 371; *Holcomb v. Stimpson*, 8 Vt. 141.

A few quotations from the cited cases will strongly emphasize what has been said. In *Robinson v. Crenshaw, supra*, it was strongly urged that the settlement was contrary to public policy, and the court said:

"The principal in the note admitted himself to be the despoiler; and as such bound to repair the injury, at least, in part. Then, could there be anything illegal or *contra bonos mores*, after the perpetration of the vice, in contracting to divide the additional expense and make partial remuneration for the injury, by providing a more ample support, than the mother otherwise had, for the innocent offspring? The case would be entirely different, had the contract been made, in consideration of any illegal or immoral act, to be done in the future—such are admitted to be void; law, and public policy, imperiously require they should be so, in order to discourage them. But not so, with regard to what has already passed; a sense of honor and justice may prompt a man to contract atonement for his wrong."

Quoting further from *Turner v. Vaughan,* 2 Wils. 339, the court said:

"Where a man is bound in honor and conscience, God forbid that a court of law should say the contrary: and whenever it appears that the man is the seducer, the bond is good."

In *Coleman v. Frum, supra,* where a bond was involved, as in this case, and in an action to enforce it the point was made that it was void because based upon an illegal consideration, the court said:

"We can perceive no objection to the legality of this contract. The statute authorizing the proceedings before the justice, was intended to enable the mother of an illegitimate child to compel the father to contribute to its support. When, therefore, he acknowledges his obligation, and for the purpose of obviating the trouble and expense of legal proceedings, voluntarily stipulates to do that which he might by law be compelled to do, the ends of justice are attained, and the objects of the law are accomplished by enforcing his undertaking."

In *Jackson v. Finney,* 33 Ga. 512, a similar case, the court said:

"Forbearance by the mother to prosecute the putative father of bastard children under the bastardy laws of this state, constitutes a sufficient consideration to support a promise by such father, to pay money or settle property for the benefit of such offspring."

In *Comm. v. Turner, supra,* Chief Justice ROBINSON, delivering the opinion of the court, said:

"She [the mother] is neither under any civil or moral obligation to institute such a proceeding, nor is guilty of any breach of public or social duty by agreeing with the father for a conventional contribution, in lieu of the statutory remedy for coercing him."

The court held that such a settlement is valid notwithstanding the public are not precluded from prosecuting the wrongdoer, if he fails to perform his duty, concluding thus:

"Then let such men make their contracts, and perform them too. But let them also know that, if their illegitimate children are not properly maintained, the law still has power to

coerce adequate contributions from those whose natural and legal duty it was to make them without solicitation or coercion; and that, whatever they do or agree to do by voluntary contract, they depend altogether upon the honor and fidelity and personal responsibility of those with whom they negotiate. Such contracts, if fair, are not illegal."

In *Maxwell v. Campbells, supra,* in condemning a defense to an action to enforce notes given in compromise of a bastardy proceeding upon the ground of illegality, the court said:

"And had there never been any prosecution in this case, and, without the pressure of a prosecution, the defendant had voluntarily come forward and executed these notes, they would have been, as they are now, good in law, because based on the consideration of not only a moral, but also a legal obligation to provide, to some extent, for the expenses and support of both mother and child."

In *Billingsley v. Clelland, supra,* a similar case, a large number of authorities being reviewed, it was said:

"Was the compromise . . . contrary to public policy and good morals, and the notes sued on by reason thereof invalid? Whenever this question on similar notes has been fairly presented to a court of last resort, the uniform decision has been in favor of their validity, unless the compromise has been procured by fraud, or the notes include an obligation not to testify against the accused in a criminal prosecution."

4. The bond provides that the payment is to be made "unless said *Gertrude Meyer* and William Meyer shall live together as husband and wife" and hence is void under *Baum v. Baum,* 109 Wis. 47, 85 N. W. 122.

The case cited treats of a contract for a voluntary separation between husband and wife. We fail to discover any element of that kind in the agreement in question.

5. The amounts to be paid are required by the terms of the bond to be determined by the county judge before any right of action to recover the same shall mature.

There seems to be no escape from that proposition. The meaning of this language is unmistakable:

"The amount to be paid to her, if the same cannot be agreed upon by the parties hereto, shall be determined by the county judge and shall be furnished and paid in the manner and way he may designate."

Why, in view of that plain provision and the absence of any showing that a cause of action was perfected in harmony therewith, the demurrer was not only overruled but judgment was ordered for the full amount named in the bond, is not perceived. The quoted language and the fact that the complaint is entirely barren of any showing of compliance therewith, is sufficient to condemn it.

By the Court.—The order is reversed, and the cause remanded with directions to enter an order sustaining the demurrer, and for further proceedings according to law.

THE STATE EX REL. JACQUITH, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

December 13, 1904—January 10, 1905.

Railroads: Underground farm crossings: Statutes: Mandamus.

1. Under sec. 1810, Stats. 1898, requiring railroads to "erect and maintain . . . suitable and convenient farm crossings of the road for the use of the occupants of the lands adjoining," the suitability and convenience is to be considered with due reference to the inconvenience and expense to the railroad company, including the possible interruption of trains, the weakening of its tracks, and the increase of the hazard of accidents.
2. Under said section, under-crossings may, in some cases, be required of a railroad as essential to the convenience of the occupants of the land.
3. Under *mandamus* to compel a railroad company to maintain and keep open an already existing farm crossing for cattle

under its tracks, the evidence, stated in the opinion, is *held* to sustain findings that the maintenance of such under-crossing, adequate for relator's cattle, was essential to his occupancy and operation of his farm; that the existing under-crossing was suitable and convenient in the sense of the statute, giving all due regard to the inconvenience and expense thereby imposed on the railroad company, and that it was located in the proper place, whether the owner's interest or the company's be considered.

4. The duty of a railroad company to construct and maintain such crossings as the court shall determine to be suitable and convenient is a clear legal duty, imposed by express statute, and may be enforced by *mandamus*.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Mandamus to compel defendant to maintain and keep open an already existing farm crossing for cattle, under its tracks. It appeared without dispute: That the Wisconsin Central Railroad Company, the predecessor of the defendant, constructed its road in the locality in question about 1871. That at that time one Brimhall was the owner of the farm now owned by relator, across which the railroad passed generally in an easterly and westerly direction. That the residence and buildings were upon the southerly part of that farm on highway, while the pasture part of the farm lay to the northward. That representatives of the railroad company applied to Brimhall for a right of way, and he consented to give it upon condition that they would always maintain a subway crossing for his passage at a place to be agreed upon. To this they assented verbally, and the road was built, and the present crossing, consisting of piling surmounted by horizontal timbers carrying the rails, was put at the place indicated by him. That after the road was built representatives of the company applied to him for conveyance, and at the same time, and as part of the same transaction, a deed of the right of way was executed, and also an agreement back for the maintenance of this subway crossing, about 1872. That when originally con-

structed it was about twelve to sixteen feet wide and eight feet high. That it had always been maintained according to its original construction, except that four or five years ago the company lowered the grade of its tracks so that the subway was only about five feet high and eight feet wide. In 1892 Brimhall sold by warranty deed to the relator the entire farm, and the latter had resided upon and operated same since; the facts in regard to the location of this subway having been fully explained to him at the time of the purchase. The principal use of the farm at all times had been for dairy purposes, the relator keeping twenty-five or thirty cows; and the arrangements were such that the barn and farmyard, with water for cattle, were on the south side of the track, while the pasturage was all to the northward. That frequent and easy access of the cattle from their pasturage to water was of great importance to their welfare and productiveness; also their freedom to pass to and from the pasture both day and night. About forty rods westward of this under-crossing the railroad company had put in and maintained for nearly thirty years a grade crossing used by the owner of the farm for passage of his wagons and men in the course of cultivation. That to use this overway crossing for his cattle would involve building a lane through his cultivated land, the employment of a man to drive the cattle each way, which would involve a crossing of the railroad at least six times a day, besides making it inconvenient for cattle to pass from pasture to water during the night. That this would involve relator in expense of approximately $100 a year, besides impairing productiveness of his dairy cows. Shortly before the commencement of this suit the railway company, in the process of improving its road and changing temporary to permanent construction, undertook to fill up entirely this under-crossing with a bank of earth, intending to leave no underground passageway, there being no other place on relator's farm so suitable therefor, by reason of the topography. Whereupon this action was com-

menced. It appeared that the maintenance of the wooden bridge sixteen feet wide in the track would involve an expense to the company of about $65 every four years, and that a steel structure would cost $1,100, besides which it was claimed there was some enhanced risk in operating the railroad, a bridge being less safe than a solid grade. It also appeared that, in case this space was filled up, the grade would need to be perforated somewhere else with a culvert to make way for the surface waters which tend toward the northward. It also appeared that about 1899 the present defendant purchased the railroad from its original constructor. At the close of the trial, upon substantially the foregoing facts, the court held that the undisputed evidence established that the duty of the railway company to maintain suitable and convenient road farm crossings required an under-crossing at the place in question, and therefore directed a verdict for the relator, upon which judgment commanding the maintenance of this crossing was rendered, from which the defendant appeals.

For the appellant there was a brief by *Howard Morris* and *Thos. H. Gill,* and oral argument by *Mr. Gill.*

For the respondent there was a brief by *Cate, Dahl & Nelson,* and oral argument by *G. M. Dahl.*

DODGE, J. Sec. 1810, Stats. 1898, requires a railroad company to "erect and maintain on both sides of any portion of its road good and sufficient fences . . . and suitable and convenient farm crossings of the road for the use of the occupants of the lands adjoining." A very large part of appellant's brief is devoted to the question who has the right to select place of a farm crossing, conceding that one be proper. But this question is not involved. The writ before us seeks to command, not the construction of a new crossing, but the maintenance of one, the place for which was selected by both parties thirty years ago, and as to which it is apparent the relator's farm has, in the course of many years, become ad-

justed, and is now occupied. We can discover in this situation no reason to consider whether the owner has any voice in the original selection of a place for his farm crossing, or, if the railroad company has the right of selection, how far it must defer to the reasonable need and convenience of the owner. Where the place has already been selected, and the railroad built with reference thereto (especially when an under-crossing), there remains only the question whether some such crossing is suitable and convenient for the use of the occupant, as those words are used in the statute. The discussion as to the right of selection is still further rendered academic by the fact that the railroad company's contention is, not that it should be at some other place, but that it should be discontinued entirely.

Although the statute requires suitable and convenient crossings for the use of occupants, we have no doubt that such suitability and convenience is to be considered with due reference to the inconvenience and expense to the railroad company, including, of course, the possible interruption of trains, the weakening of its tracks, and the increase of the hazard of accidents; in other words, that a crossing, especially an additional one, which would only slightly enhance the convenience of the owner, but would seriously obstruct the operation of the railroad, or impose upon it very great expense, should perhaps be denied altogether under certain circumstances. There is, however, nothing to indicate that those considerations have been ignored by the trial court in the present case, nor have we any disposition to ignore them in the consideration of the evidence. That under-crossings may, in some cases, be required of a railroad as essential to the convenience of the occupant of the land, is fully established by all authorities. *Jones v. Seligman,* 81 N. Y. 190; *Beardsley v. L. V. R. Co.* 65 Hun, 502, 20 N. Y. Supp. 458; 8 Am. & Eng. Ency. of Law (2d ed.) 432; *Port v. H. & B. T. R. Co.* 168 Pa. St. 19, 31 Atl. 950; 3 Elliott, Railroads, § 1147; *Buffalo*

S. & C. Co. v. D., L. & W. R. Co. 130 N. Y. 152, 29 N. E. 121; *Beardsley v. L. V. R. Co.* 142 N. Y. 173, 36 N. E. 877. We have no hesitation in affirming this view, for they may be vastly more promotive of the owner's convenience and, while they may involve more of expense to the railroad company, it may well be doubted whether they are not always a real economy over the grade crossing with its continual peril of collision of trains with passing teams or cattle.

Turning to the evidence in this case, we find it wholly without dispute as to specific facts. Its substance is sufficiently set forth in the statement of facts. We are satisfied, after careful consideration, that the trial court was correct in the view that no inference could reasonably be drawn from such facts other than that the maintenance of an under-crossing adequate for relator's cattle is so essential to his occupancy and operation of his farm that it is suitable and convenient in the sense of the statute, giving all due regard to the inconvenience and expense thereby imposed on the railway company. As to location, there is no possible doubt that, if such crossing is to be maintained at all, this is the proper and best place for it, whether the owner's interests or the company's be considered. Hence the instruction of verdict for relator was proper. The duty of the defendant to construct and maintain such crossings as the court shall determine to be suitable and convenient is a clear legal duty, imposed by express statute, and therefore enforcible by *mandamus,* notwithstanding it might, perhaps, be enforced also by proceedings in equity. *State ex rel. Grady v. C., M. & N. R. Co.* 79 Wis. 259, 48 N. W. 243.

By the Court.—Judgment affirmed.

McKenzie, Respondent, vs. Haines and wife, Appellants.

December 13, 1904—January 10, 1905.

Trial: Findings of facts: Highways: Dedication: Acceptance: Evidence: Injunction.

1. Under sec. 2863, Stats. 1898, requiring the trial judge to state in his decision the facts found by him, and his conclusions of law thereon, only the ultimate conclusions of fact drawn from the evidentiary facts and essential to the settlement of the conflicting claims of the parties should be stated, and omnibus findings to the effect that all the material allegations of the complaint are proven, and that the allegations of the answer inconsistent therewith are unproven, fail to respond to the mandate of the statute. *Farmer v. St. Croix P. Co.* 117 Wis. 76, and other cases, followed.
2. In an action in equity to compel the removal of obstructions from an alleged highway, and to enjoin future obstruction thereof, the evidence, stated in the opinion, is *held* to negative the claim that the use of the *locus in quo* was so extensive or long continued as to demonstrate acceptance by the public of an offered dedication.

Appeal from a judgment of the circuit court for Sauk county: R. G. Siebecker, Circuit Judge. *Reversed.*

This is an action in equity to compel the removal of obstructions upon an alleged public highway in the village of Merrimac, and to enjoin any future obstruction thereof. The answer denies the existence of the alleged highway, and claims title by adverse possession. River street, in the village of Merrimac, runs nearly north and south, and the disputed parcel of land is a strip fifty feet wide, running at right angles with River street, and extending west therefrom to Second street, which runs parallel with River street. The plaintiff admittedly owns the land adjoining this strip upon the south and fronting upon River street, and has a barn upon her property fronting on the strip. The defendant admittedly owns the parcel of land adjoining the strip upon the

north, and fronting on River street, and claims also to own the strip itself. The evidence showed that in 1858 one Flanders owned a large tract of land, including the lands of plaintiff and defendant as well as the strip in question, and on the 25th of June of that year deeded a large parcel thereof, including the properties of the plaintiff and defendant, to one Butterfield, the deed containing the following clause:

"Reserving fifty feet in width commencing at the center of said land on River street, and running south seventy-two and one half (72½) degrees west to the westerly line of said land; also reserving fifty feet in width commencing near the center of the northern line of said land and running south eighteen and one half (18½) degrees west through said land, and extending and continuing to Main street, so-called, said reserved land to be and is hereby appropriated for a public highway, and to be used for no other public purposes whatsoever."

It appears further that a mistake was made in said clause by using the word "south" instead of "north" where the word "south" first occurs in the clause, and that in the year 1876 an action in equity was brought by Flanders against Butterfield and another to correct the description of said reservation, which action resulted in a judgment, in the same year, correcting said description by inserting the word "north" instead of the word "south," so that it correctly describes the strip in question, and further adjudging that the defendants be enjoined from obstructing the strip; that subsequently the plaintiff acquired title to her present premises on the south side of the strip, and built her barn; that title to the land on the north side of the strip was subsequently conveyed to the defendant; that in 1880 Flanders quitclaimed to one Quimby "the lands reserved for streets" in the deed from Flanders to Butterfield; and that by subsequent deeds, containing the same description, said strip was conveyed from Quimby to Shepard in 1885, from Shepard to Barrow in 1891, and that in 1901 Barrow and wife conveyed by warranty deed to the defendant and wife the parcel upon the north side of the

strip, as well as the strip itself. The principal question of fact in the case was as to whether the alleged street had been accepted by the public as a highway, either by general user or by the expenditure of public moneys thereon, or both; and upon this question the testimony was very conflicting, there being testimony tending to show both user and working, and also testimony tending to show that it had never been opened to the public for any considerable length of time, and that any user by the public was permissive, and very slight. The court found, among other things, as follows:

"That said street so dedicated has been used by the public to some extent, particularly for foot travel, although for a large portion of the time the west end was fenced across, and such travel was through a gate or bars. That the plaintiff has made use of said strip or street as and for an approach to her barn, and as a means and way of gaining access to her said barn and her premises. That said strip or street was at times fenced in in part, and used for garden and agricultural purposes by one Shepard, who claimed to be the owner thereof; and that said Shepard built or dug a well several years ago upon said strip or street under the same claim of ownership. That the right and interest of the plaintiff in the public easement in said street and in having the same opened and kept open as a street and as a way and approach to her barn and premises is different from and in addition to the right of the general public, and is special and peculiar to her as the owner of the property described in her complaint, adjacent thereto. That all the material facts stated and set forth in the complaint are proven and true, and that the allegations of the answer inconsistent therewith are unproven and are not true. And as conclusions of law the court finds: That there is nothing in the fact that said Shepard constructed said well upon or in said street, or in the fact that said street had been fenced in and used for garden or agricultural purposes, and nothing in the proofs or the facts shown upon the trial which estops the public or said plaintiff from asserting the public right to said strip of land as so dedicated to public use as a street. That the rights of the public and of said plaintiff in and to said street, and to have the same opened and cleared of obstruc-

tions, have not been lost by abandonment, nonuser, or in any other manner. That the plaintiff is entitled to judgment, and to the relief demanded in the complaint."

Judgment was rendered for the plaintiff on these findings, and the defendant appeals.

For the appellants there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

For the respondent the cause was submitted on the brief of *G. Stevens.*

WINSLOW, J. This is an action in equity to obtain the removal of obstructions in an alleged public highway, and to enjoin its future obstruction. It was brought by a private party on the ground that such party suffered peculiar damage different in kind from that suffered by the public generally by reason of the obstructions. The question litigated was whether the *locus in quo* was in fact a public highway.

A public highway may be created by the making and recording of a plat, in conformity with ch. 101, Stats. 1898, with the highway or street indicated thereon, and when this is done no act on the part of the public is necessary to make it a public highway. Sec. 2263, Stats. 1898; *Gardiner v. Tisdale,* 2 Wis. 153; *Pettibone v. Hamilton,* 40 Wis. 402. Where, however, there has been no compliance with this statute, a public street may also be created when the proprietor, by his acts, has indicated his intention to dedicate the same to public use as a street, and this offer of dedication has been accepted by the public authorities by assuming control and expending public moneys thereon, or by actual user thereof by the public to such an extent and for such time as to show that public convenience requires the same. *Buchanan v. Curtis,* 25 Wis. 99. A highway may also be created by long-continued prescriptive use by the public; but, as no claim of this kind is here made, it is unnecessary to enlarge upon this proposition. It is not claimed in the present case that there was

any plat made or recorded; hence, if any public highway exists, it must exist by virtue of a parol or written dedication by the owner, and acceptance of such dedication by the public. We cannot doubt that the so-called reservation in the original deed from Flanders to Butterfield in 1858, by which the strip in question was reserved and "appropriated for a public highway," amounts to an offer to dedicate the same for public highway uses. It was a standing offer, clearly showing the owner's intent to dedicate, and might be accepted by the public in the manner hereinbefore mentioned at any time before it was withdrawn. Being merely an offer, it could, of course, be withdrawn before acceptance. It was undoubtedly, in legal effect, withdrawn when the owner, in 1880, made a deed of the strip to Quimby. The question, then, is whether the evidence shows acceptance by the public before that withdrawal. Upon this question—which was the turning point of the case—the findings of the trial court manifestly ought to be clear and conclusive. The statute requires the trial judge to state in his decision "(1) the facts found by him, and (2) his conclusions of law thereon." Sec. 2863, Stats. 1898. The requirement that the "facts found" be stated manifestly requires not merely that evidentiary facts be stated, but that the ultimate conclusions of fact drawn therefrom and essential to the settlement of the conflicting claims of the parties should be stated. In the present case a finding that the public used the strip to some extent at times would not be specially illuminating nor helpful, because it would not settle the ultimate fact, namely, whether such use was sufficiently general and continuous as to constitute an acceptance of the offer of dedication. Turning now to the findings, we find just the difficulty referred to. The only findings of fact which in any way touch the question are as follows:

"That said street so dedicated has been used by the public to some extent, particularly for foot travel, although for a large portion of the time the west end was fenced across, and

such travel was through a gate or bars; that the plaintiff has made use of said strip or street as and for an approach to her barn, and as a means and way of gaining access to her said barn and her premises; that said strip or street was at times fenced in in part, and used for garden or agricultural purposes by one Shepard, who claimed to be the owner thereof, and that said Shepard built or dug a well several years ago upon said strip or street under the same claim of ownership."

These are the only findings of fact which in any way touch the question of acceptance by the public, except for an omnibus finding that all the material allegations of the complaint are proven, and that the allegations of the answer inconsistent therewith are unproven. As conclusions of law the court only found, in effect, that the public was not estopped by the acts of Shepard, and had lost no rights in the street by abandonment, nonuser, or in any other manner, and that the plaintiff was entitled to judgment. It is difficult to conceive of findings more vague or inconclusive upon the vital question in issue. When was this use by the public? Was it before or after 1880? When was the street fenced, and for how long did it remain so? What was the extent of the public use? Was it sufficiently extensive and long continued as to show that public convenience required the street? All these and other questions equally vital and necessary in order to determine the question of acceptance by the public use are entirely undetermined, unless, indeed, it can be said that the omnibus finding to the effect that the material allegations of the complaint are proven and true supplies the deficiency, the complaint alleging that immediately after the conveyance of 1858 the strip was opened to the public for travel and was traveled and used as a highway for many years. The unsatisfactory character of this sort of a finding, and its utter failure to respond to the mandate of the statute, has been already commented upon by this court in the cases of *Milwaukee Nat. Bank v. Gallun,* 116 Wis. 74, 92 N. W. 567, and *Burke v. Sidra Bay Co.* 116 Wis. 137, 92 N. W. 568; in the latter of

which cases it was, in substance, held that, where such a statement is attempted to be substituted for specific findings of fact, it becomes necessary for this court to examine the evidence to ascertain whether it supports the judgment.

We shall not undertake in the present case to discuss at large the importance of a full compliance on the part of the trial courts with the statute requiring specific findings of fact in every action tried by the court. That question is sufficiently considered in certain recent cases, among which, in addition to those previously cited, may be named *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363, and *Farmer v. St. Croix P. Co.* 117 Wis. 76, 93 N. W. 830. The attention of the bar and trial courts is again called to these cases, and especially to the discussion in the *Farmer Case.*

There being no finding of the fact of acceptance by the public, nor of facts from which such acceptance must follow as a legal consequence, we pass to the consideration of the evidence itself upon the question, remembering that the burden of proof of the fact is upon the plaintiff. Upon such consideration we find the evidence of any acceptance by the public by working or by public use, either before or after the revocation of the offer of dedication in 1880, to be very unsatisfactory. The sole evidence of any working of the strip as a highway by the public authorities is given by the witness Odekirk, who testified that at one time he did some work upon it in working out his road tax by digging and removing some stone to make a better roadway, and that he worked on the street at one other time. He first says that he dug the stone in 1868 or 1869, and that he worked in the road after the suit at Mauston (1876). He then says that he worked on the street and its approach at two different times; but whether it was before or after the suit at Mauston he could not say, but that three or four years intervened between one job and the other. Manifestly, such vague and uncertain testimony cannot be relied upon to support a conclusion of acceptance by

working it as a highway prior to 1880. The evidence as to public user is equally unsatisfactory. True, a number of witnesses testify to having used the strip, or seen others use it, at various times, for passage, but all are quite vague as to time, and substantially admit that there were times when it was closed, and long periods when it was cultivated. The testimony seems overwhelming that since 1884 the strip has been cultivated most of the time, as well as fenced in from the public. Charles Williams, a witness for the plaintiff, who lived on the Haines place from 1872 till 1883, testifies that during that time the strip was both open and closed at different times, and that there was a kind of a squabble over it all the time, and this seems to pretty accurately describe the situation. There was much testimony also that much of the use at all times was permissive, and through gates or bars. Upon the whole testimony we are clearly of the opinion that the evidence does not prove that the use of the strip, either before or after 1880, was so extensive or long continued as to demonstrate that the public convenience required the same.

As the evidence seems to have been fully presented, we deem it best to make a final disposition of the case in this court.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the defendant dismissing the complaint.

SIEBECKER, J., took no part.

HEIMLICH, by guardian *ad litem*, Respondent, vs. TABOR, Appellant.

December 14, 1904—January 10, 1905.

Trial: Excessive verdict: When court can grant option to remit excess: Damages.

1. In case of a verdict which is fatally excessive, either from perversity or other cause, whether dealt with in the trial or appellate jurisdiction and whether the excess is susceptible of determination by computation or not, the right to recover being clear, it is proper to so provide that one party to the litigation, at his option, whether the other consents or not, may terminate the controversy by a judgment for less than the amount named by the jury.
2. In providing, as indicated, the court cannot legitimately invade the right of trial by jury by substituting its judgment on the evidence, as to the proper amount to be awarded plaintiff, for the judgment of a jury.
3. The only proper basis for determining the correct amount of a verdict which is fatally defective, is the probable finding by an impartial jury, reasonable doubts being resolved against the party to whom the option is given to take or submit to judgment.
4. The practice, where the only error in a verdict is that it is fatally excessive, of naming a sum for which judgment may be rendered at the option of one of the parties, is highly beneficial in the administration of justice, and does not prejudicially, if at all, violate the rights of either party, if grounded upon the proper basis.
5. Where the option is given to the plaintiff to take judgment for a less sum than that found by the jury and thus avoid a new trial, such sum should be placed as low as an impartial jury on the evidence would probably name, and where the option is given to the defendant to submit to judgment and avoid a new trial, regardless of the attitude of the plaintiff, the sum named should be as large as an impartial jury on the evidence would probably find.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover damages for false imprisonment and malicious prosecution. The evidence tended to show these circumstances: Appellant for some time prior to the occurrence complained of had been accustomed to put out traps along the Wisconsin river for the purpose of catching fur-bearing animals. Occasionally he lost one or more traps in a manner indicating that the taker had appropriated the same with whatever animals were therein. November 22, 1903, defendant discovered that some of his traps had been taken and that tracks made by some person led from the vicinity of the taking to the home of plaintiff, who was a minor under fourteen years of age residing with his parents. Thereupon defendant, without making any demand for the traps or further investigation of the matter, obtained from a justice of the peace a search warrant and placed the same in the hands of an officer for the purpose of having the premises of plaintiff searched with a view of discovering the missing traps. Said officer visited such premises to execute the warrant. Thereupon plaintiff admitted taking some of the traps, and produced those most recently missed. He gave as a reason for taking them that his father's dog got into one, and that he removed them to prevent a reoccurrence of such accident. After being pressed to give up other traps that had been missed he produced some more. Defendant selected from those exhibited all he could identify as his and took them away. The traps plaintiff took were found by him upon the premises of his father. After the occurrence mentioned, defendant endeavored to extort money from plaintiff or his father by threatening that unless money was paid he would have plaintiff arrested and sent to jail or the reform school. After the lapse of about three months, such threats not having resulted in compliance with defendant's demands, he sued out a search warrant and a warrant for plaintiff's arrest for larceny. Such offense was committed, if at all, in the town of Merrimac. The warrant was issued by a police justice of

the city of Prairie du Sac who had no jurisdiction in the matter. Plaintiff was arrested upon the warrant and taken before the police justice, who, without giving him time to see his father, adjourned the cause for one week, and consigned plaintiff to the public lockup for safe keeping until he could furnish bail. He was there confined for some three hours, when by the friendly interference of a citizen of the place he was released. On the adjournment day for the first time the district attorney was called in. As soon as he acquainted himself with the facts he caused the proceedings to be dismissed.

At the close of the evidence it was conceded that plaintiff was entitled to a verdict for such damages as the jury might find warranted by the evidence. The jury rendered a verdict in plaintiff's favor for $400, which the court permitted to stand for $200, remarking that it seemed that the damages assessed were so large as to indicate that the jury were influenced by some improper motive. Plaintiff consented to take judgment for $200, and the cause was closed accordingly, defendant appealing to this court.

For the appellant the cause was submitted on the brief of *G. Stevens.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

MARSHALL, J. We assume for the purposes of this case, the verdict was so unreasonably large as to satisfactorily indicate that in reaching the decision the jury were moved by some improper influence, either consciously or unconsciously—the trial court having reduced it to the extent of one-half, accompanying such action by the statement that it was tainted with perversity. So defendant has not had the damage assessable against him determined by an impartial jury upon the evidence, but has been compelled to submit to such a judgment in that regard as respondent was willing to accept. If there be any question at this late day as to whether

the rights of parties can thus be determined, and if they can, as to wherein exists a basis for the practice justifying it as not involving judicial violation of the ancient right of jury trial, no better opportunity is liable to be presented for solving it than the one in hand.

Counsel for appellant confidently assert that appellant's right to an assessment of damages by a fair and impartial jury, instead of being compelled to submit to the judgment of the trial judge in lieu thereof, has been flagrantly violated, and to vindicate such claim points to this expression in *Gillen v. M., St. P. & S. S. M. R. Co.* 91 Wis. 633–636, 65 N. W. 373, 374:

"The parties are entitled to have an assessment of damages made by a fair and impartial jury, and to have the impartial judgment of the jury in that behalf."

That language is similar to expressions indulged in where the doctrine prevails that except in cases where the excess allowed by the jury is susceptible of computation to something like mathematical accuracy, the court has no right to say that the verdict shall not stand as rendered, but may stand at a less sum, naming the same; that if the court deems the verdict too large, in an action for general damages or in any cause of action where the proper amount to be arrived at cannot be determined by mere calculation, there is but one course rightly pursuable, unless both sides consent to a different one, and that is to set the verdict aside and grant a new trial; that to do otherwise would substitute the judgment of the judge for that which the parties are entitled to have. It is said, that rule should be observed with great strictness where the verdict is perverse, because such a one is really no verdict at all.

Doubtless, unless the trial judge in scaling down a verdict and permitting one party to a suit to accept the situation thus created and end the controversy, whether his adversary is willing or not, determines the proper amount of the verdict

from the standpoint of what, in his judgment, a jury would probably allow, the language of jurists and text-writers, forcibly as they do, condemning such practice would seem to be unanswerable. Where such practice prevails rulings in that regard will be found accompanied, especially in appellate jurisdictions, with expressions like these: "The amount so determined upon will be a liberal allowance to the plaintiff for the injury:" "The sum which we have named, if found by the jury, would not be deemed excessive:" "So large a sum as that we suggest might reasonably have been found by the jury:" "The sum we have named will fairly compensate the plaintiff:" and also with a vigorous affirmance of the doctrine that the judgment of the jury is the proper test of the amount to be recovered, and that nothing can be legitimately substituted for it against the protest of either party. In other cases where the indications are more or less significant that the rights of the unconsenting party were intended to be adequately guarded, expressions like these are found: "The right of the trial court to allow plaintiff to remit *the excess* and then give him judgment for the residue is almost universally recognized." *Baker v. Madison,* 62 Wis. 137–151, 22 N. W. 141, 583; *Corcoran v. Harran,* 55 Wis. 120–127, 12 N. W. 468, 471: "The verdict should have been allowed to stand upon condition that the plaintiff remit *the unreasonable excess.*" *Heddles v. C. & N. W. R. Co.* 74 Wis. 259, 42 N. W. 243: "The trial court or the appellate court, where the only error in the verdict is that it is excessive, whether it be deemed perverse in that respect or not, may rightly permit it to stand, if the plaintiff consents to reduce it to the proper amount."

Now it would seem to be quite clear that if a trial or appellate court compels a defendant to submit, at the plaintiff's option, to a judgment for less than that named in a verdict, held to be fatally excessive, thus enabling the plaintiff to succeed without a new trial, and fails to guard against all reasonable danger of impairment of the former's rights,—as for

example, if it does so on the basis of allowing a *liberal,* or full, or, from the judge's standpoint, merely a fair compensation to the plaintiff, it invades the rights of the defendant. It does just what all courts have declared cannot be legitimately done.

Further to allow a verdict which is fatally excessive to stand upon condition of plaintiff remitting the excess, or as it is sometimes said as indicated, consents to a reduction thereof to *the proper amount,* is likewise an invasion of such right, unless the *amount of the excess, or the proper amount* of the verdict is determined upon some basis which fairly takes the judgment of a jury for the guide instead of the independent judgment of the court. It is not logical to so vigorously defend the right of jury trial in civil actions by mere words and accompany it by substituting therefor, in fact, the judgment of the court. The right of jury trial is as sacred to the defendant as to the plaintiff.

The practice of treating fatally defective verdicts,—the right to recovery being unquestioned,—so as not to prejudicially invade the rights of either party and yet terminate the litigation without the expense of another trial, is in the interests of public and private justice. It is a great boon to the parties directly interested, and to the public as well, upon whom in a great measure the burden of judicial administration rests. Notwithstanding the remarks quoted from the opinion of Mr. Justice NEWMAN, in *Gillen v. M., St. P. & S. St. M. R. Co. supra,* such practice is firmly established in this state, both as to trial courts and this court. It has become the judicial custom in case of a fatally excessive verdict where the right to recover is clear, whether the error is attributable to perversity or not, and whether the defendant does or does not consent, to permit the plaintiff to terminate the controversy without the expense of a new trial by consenting to take judgment for an amount sufficiently under that named by the jury to cure such error in the judgment of the court (*Baker*

v. Madison, supra); and also to permit the defendant in such a situation to terminate the litigation, whether plaintiff is willing or not, by consenting to judgment for a sum sufficiently less than the verdict to, in the judgment of the court, cure the error (*Rueping v. C. & N. W. R. Co. ante,* p. 319, 101 N. W. 710). That rule with a legitimate basis therefor has been evolved in the course of years of judicial administration as a most valuable means of "promptly and without delay" terminating disputes between parties to the end that, so far as due course of law will permit, wrongs may be remedied or prevented without that financial exhaustion which tends to make men surrender valuable rights rather than to persist in efforts to secure them by legal means.

No reason is perceived for retracing judicial footsteps as to that practice, and no reason for apologizing for its existence, while the reasons are many for more thoroughly intrenching it on a logical basis that will meet all criticism, if that has not heretofore been done. It is believed that the one already established here satisfies that essential. That requires the sum imposed upon the defendant, whether he consents or not, giving the option to the plaintiff, to be as small as an unprejudiced jury would probably name; and the sum to be imposed upon the plaintiff, whether he consents or not, giving the option to the defendant, to be as large as an unprejudiced jury on the evidence would probably name. This court has, in recent years at least, in dealing with such verdicts endeavored consistently to follow that course, deeming it the only one pursuable, consistent with the principle that the right of jury trial should not be judicially invaded. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Rueping v. C. & N. W. R. Co., supra.* In view of this the remarks in *Gillen v. M., St. P. & S. S. M. R. Co.* 91 Wis. 633, 65 N. W. 373, upon which counsel for appellant relies, are misleading, so far as they suggest that there must necessarily be a new trial when there is a perverse verdict.

It does not affirmatively appear that the trial court in dealing with the verdict in question failed to observe the practice above indicated as to the manner of determining the amount for which plaintiff might, at his option, take judgment. We must assume, therefore, that it endeavored to do so. In such circumstances the trial court necessarily is required to decide questions of fact. The inquiry in such a case is, what amount would an unprejudiced jury, properly viewing the evidence, probably say would be an equivalent for the plaintiff's injuries? Looking at the matter, of course, from one standpoint, where the option is to be given the plaintiff, and another where it is to be given the defendant; the conclusion reached in solving such a question, the same as in other questions of fact, must be regarded as a verity upon appeal, unless it appears from the record to be clearly wrong.

Applying the rule stated to the evidence before us, we are unable to conclude that the verdict as reduced is excessive, or the appellant's right to have an impartial jury determine the measure of his liability was prejudicially invaded. Liability to compensate respondent is conceded, and was in the court below. The evidence was produced before the jury as fully as appellant desired. The whole case was spread before the court, leaving but the one question to be solved of what sum appellant ought to pay respondent. The verdict reached, though fatally excessive, was reduced to as small an amount as any other jury on the same evidence would probably assess in respondent's favor, or as the jury which heard the case, had it acted properly, would probably have assessed the same. The discretion of the trial court, as an original matter, respecting the amount of money constituting a fair equivalent for the wrongs done to respondent, was not made the basis for the judgment complained of, but its discretion respecting the amount which the jury, had they viewed the case properly, would have awarded plaintiff, or the amount which another jury would probably award resolving reasonable doubts in

that regard against the party favored with the option, was made such basis. Therefore appellant has no reason whatever to complain.

By the Court.—The judgment is affirmed.

WHEELER, Respondent, vs. SEAMANS, Appellant.

December 15, 1904—January 10, 1905

Trial: Directing verdict: Appeal and error: Exceptions, when properly taken: Compromise and settlement: Mutual mistake: Evidence.

1. Where the court directs a verdict, a motion for a new trial is not necessary to permit the appellate court to consider whether the evidence supports the verdict.
2. An exception should be taken to the effective act of the court, and not to a mere expression of opinion preliminary thereto.
3. The record on appeal showed that the trial judge, in declaring his views on a motion for direction of a verdict, closed with the announcement that he found no evidence which would warrant a submission of the case to the jury, at which point the record stated: "To which ruling the defendant then and there duly excepted." This was followed by a formal statement from the court to the jury, the direction of a verdict, and direction to one of the jurymen to sign it as foreman. No further exception appeared. *Held*, that the exception taken, though interpolated before the effective ruling of the court, should be deemed to apply to the act of directing the verdict.
4. In an action on a due bill given in settlement of partnership accounts, the evidence, stated in the opinion, is *held* to sustain the claim that the settlement was based on a mutual mistake as to conceded liability.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Some time prior to April, 1903, plaintiff withdrew from partnership with the defendant in a newspaper and printing

business, leaving in the latter's hands a considerable amount of current ledger accounts, subject to offset and uncertainty as to collectibility, and also about $228 of so-called directory accounts, due for advertisements to be inserted in a directory which the firm had in process of issue. As to the latter, it was agreed that plaintiff should receive one fourth; the defendant being to the work of completing the issue of the directory and collecting. As to the general ledger accounts, they were understood to belong equally to both, subject to any indebtedness of the firm. Defendant collected, and from time to time divided with plaintiff, the proceeds of general accounts, until about April 4, 1903, when plaintiff again inquired what moneys had been received, and the parties met at defendant's office to go over the accounts. It was found that the defendant had collected $60.68 of ledger accounts, above certain bills paid, leaving uncollected accounts of about $149, of uncertain value, and involved by unknown offsets; also directory accounts aggregating $176.90, of which the plaintiff's share would be $44.20. As to his right to one half of the $60.68 and the whole of the $44.22, there was no question. Thereupon plaintiff proposed that defendant buy him out, and, after some chaffering, defendant offered to give him $125 in full settlement of all the plaintiff's rights in the accounts of both classes, which plaintiff accepted, whereupon defendant gave a duebill for that amount. This action was brought, based upon the settlement and the duebill. Defendant claimed a mistake, in that, before proceeding to negotiate as to a gross price for purchase, it was mistakenly assumed by him, to the knowledge of the plaintiff, that the conceded indebtedness consisted of $60.68 and $44.22, or a total of $104.90. This was denied by plaintiff, and, after a trial to a jury, the court directed a verdict in favor of the plaintiff for the amount of the duebill, less the conceded sum of $94.69, which the defendant had paid him, viz., $30.31. There was

no motion for a new trial, and judgment was entered in accordance with this verdict, from which the defendant appeals.

For the appellant there was a brief by *Ed. C. Gottry* and *G. Stevens,* and oral argument by *Mr. Gottry.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

DODGE, J. Respondent urges that we cannot consider whether the evidence supports the verdict, for the reason that no motion for new trial was made. In this counsel labor under a misconception. We have no occasion to consider whether the verdict is supported, but whether the ruling of the court directing such verdict was right or wrong. Since that direction can be proper only in case there was no evidence which, if believed by the jury, might have supported a different verdict, its correctness can be established only by examining the evidence, to the extent, at least, of ascertaining whether there was any to the contrary. If so, the ruling is error, though there be abundant evidence to support the verdict if it had been rendered by the jury. Such ruling made in course of the trial can, of course, be reviewed, if exception to it be preserved, and it, with the exception, be brought into the record by bill of exceptions.

It is further urged, however, that no exception was taken to the direction of a verdict. This, if true, would certainly be fatal. *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299–303, 50 N. W. 99. We find some support for this contention. Upon plaintiff's motion for such direction, the court declared his views as to the rules of law governing him thereon, and as to the evidence; closing with the announcement that he could find none to show mistake on defendant's part which would warrant a submission of the case to the jury. "To which ruling the defendant then and there duly excepted," says the record. The court continued, by a formal statement,

that he found no evidence to warrant submission of the case to the jury, and that it became his duty to direct a verdict for plaintiff, whereupon he directed one of the jury to sign such verdict as foreman. No further exception appears. This presents very much the appearance of a failure to except to the only act which could prejudice the defendant, namely, the direction of a verdict. A mere academic discussion and expression of opinion by the court is not prejudicial, save as it might mislead the jury. It is only where that opinion is carried into effect, as by admitting evidence, or, as here, in directing a verdict in pursuance of it, that a party's rights suffer. Strictly, the exception should be taken to that effective act, and not to the mere expression of opinion. In the present instance, however, the conduct of the trial court in expressing his reasons and giving the resulting direction were so continuous—so all one act—that, with some hesitation, we hold that this exception, though interpolated before full consummation, must be deemed to apply to the act itself. We think it must have been so understood by the trial judge and opposing counsel, so that it served to notify the former that appellant protested the act as erroneous, so as to give opportunity for correction, and also notified him that appellant intended to preserve his right to challenge that act on appeal. These are the real, practical purposes of noting an exception. We conclude, therefore, that the merits of this ruling are before us for review.

Turning to defendant's testimony, we find him to declare that, after ascertaining first that the total ledger collections were $60.68, that figure was set down by each on the sheet on which the list of such collections had been set down and added up. Thereupon, on another sheet, were put down the various directory accounts collected; total of $176.90 reached; that divided by 4, and the result, $44.22, as plaintiff's share, found; then carried to first sheet, and added to the $60.68; making total of $104.90. That, of course, on its face,

was a blunder, for only half of the $60.68 should have been added to the $44.22. At this stage plaintiff asked defendant to make him an offer to buy out all his interest, and, after some offers by plaintiff, defendant said, "Let's see what I owe in cash first," and one or the other said, "There is $60.68 and $44.22 cash collected; that amounts to $104.90." "It was said I owed him $104.90. We both figured I owed him $104.90." Thereupon defendant offered $125, which plaintiff accepted. This is in large measure contradicted by plaintiff, but receives some confirmation from the sheets of paper on which plaintiff made figures at that time, which shows the figures "$60.68" and "$44.22" brought together on the first sheet and added together. Upon another sheet, whereon was made a list of the uncollected accounts, which were the only subject of compromise, there appears the total $104.90, with the words "due me"; thus indicating clearly that such erroneous total of conceded indebtedness was during the negotiation adopted by plaintiff. This evidence clearly tends to show that the offer of $125 by defendant was made upon the mistaken assumption that his conceded liability was $104.90, instead of $74.56, and that plaintiff knew it. That plaintiff also supposed the former to be the correct figure, is indicated by his entry of such fact at the time as above stated, so that the evidence tends also to show mutuality of the mistake. It hardly lies in plaintiff's mouth to ask a court to indulge in a presumption that, instead of being mistaken, he was guilty of a fraud, in knowingly allowing defendant to make the settlement, by mistake, upon a wrong basis. The conclusion is obvious that the case should have been submitted to the jury, and error was committed in directing verdict for plaintiff.

By the Court.—Judgment reversed, and cause remanded for a new trial.

SLITER, Appellant, vs. CARPENTER, Respondent.

December 14, 1904—January 10, 1905.

Navigable waters: Title to islands: Boundaries: Trespass: Practice: Trial of issue of fact by court: Necessity of findings: Nonsuit.

1. The grant of lands on the bank of a navigable stream, made without limitation or reservation as to adjacent islands, vests in the purchaser the title to any unsurveyed island lying between the bank and the thread of the stream.
2. Plaintiff and his assignors were the owners of the lands on the south bank of a navigable river opposite which was an unsurveyed island, the main body of which island lay south of the thread of the stream. Defendant entered on this island and cut timber on that part of the island lying near the south bank of the river. No separation, by conveyance, of the island from the bank was shown. *Held*, that the plaintiff was entitled to recover from the defendant the value of the timber cut and removed therefrom.
3. Under sec. 2863, Stats. 1898, requiring upon trial of an issue of fact by the court, its decision shall be made in writing, and that the judge shall state separately the facts found by him, and his conclusions of law thereon, when an action is tried by the court without a jury, it is error to grant a motion of nonsuit, and to thereon award judgment dismissing the complaint.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an action to recover damages for cutting wood from an island in the Wisconsin river. The plaintiff is the owner of the fractional northeast quarter of the southwest quarter of section 24, township 8 north, range 3 east, which is designated as lot 3. This land lies adjoining and borders on the Wisconsin river. On the bed of the river, bordering on plaintiff's land, is an island, which extends to the west. The river bed borders on fractional lots of land in the same section, known as lots 1 and 2, one of which is owned by John L. Jones, and the other by plaintiff and Edward B. Sliter. The defendant is charged with having cut growing timber from off a portion of this island during the month of January, 1901, and there-

after, to the damage of these owners. Plaintiff is the assignee of any right of action which John L. Jones and Edward B. Sliter may have had against defendant on account of the cutting of such wood. It appears that the south bank of the river was surveyed by the government in 1833 and 1834, and a record thereof was duly made under governmental authority, consisting of a plat and field notes, and that the title to these lots of land was derived from the government. The location of these lots is shown to be on the Wisconsin river, forming the south bank or shore. The land lying opposite these lots, and forming the north bank of the river, was surveyed and platted by the federal government in 1841, and record thereof was duly made, showing its location by government descriptions. The land forming this north bank of the river lies in the same township with these lots. It appears that an island existed in the river between the shore of the river bordering on these lots on the south and the opposite north shore of the river, which was not surveyed nor described, but was noted by outline on the two plats of the surveys of the township. The outline and location of the island differ on these plats. From the field notes it appears that the head or upper end of the island was in front of lot 1, and extended down the river in front of and beyond lots 2 and 3. The evidence shows that the island is separated from the upland or bank of the south of the river by a narrow part of the river channel or a slough, which has been practically the same since 1853, and that the main part of the river channel lies between the island and the north shore of the river. The south bank or shore is rocky and precipitous, and has not materially changed since the survey, and the north shore of the river has but slightly changed since the government survey of the shore in 1841. It is conceded that the main body of the island lies south of the line midway between the two banks of the river, and that timber was cut by defendant off the part of the island lying near the south river bank, in front of lots 1, 2, and 3. The

parties waived a jury, and tried the cause before the court. At the conclusion of plaintiff's testimony, defendant made a motion for a nonsuit, which was granted. No findings of fact or conclusions of law were made in the case. A judgment as upon nonsuit was granted, and for costs. Plaintiff appeals from this judgment.

For the appellant there was a brief by *Thomas W. King*, attorney, and *Olin & Butler*, of counsel, and oral argument by *Mr. King* and *Mr. H. L. Butler*.

For the respondent there was a brief by *Grotophorst, Evans & Thomas*, and oral argument by *E. A. Evans*.

SIEBECKER, J. The facts of this case are to the effect that an island formed on the Wisconsin river bed, the main part of which is in front of the above-described land, designated as lots 1, 2, and 3—being fractional quarter sections—and that plaintiff and his assigns are riparian proprietors of the bed of the river in front of these lots of land. It is also conceded that the greater part of the island lies between the south bank of the river and the thread of the stream (i. e., midway between the two banks), and that this has been the situation since 1853. There is no contention but that defendant did some cutting of timber on the island to the south of the line midway between the north and south river banks; thus being within the river bed in front of, and bordering on, the land owned by plaintiff and his assignors.

It was held in *Chandos v. Mack*, 77 Wis. 573, 46 N. W. 803, that a grant of lands on the bank of a navigable stream, made without limitation or reservation as to the adjacent islands, vests in the purchaser the title to any unsurveyed island lying between the bank and the thread of the stream. This ownership is predicated upon the ground that the riparian proprietors in this state are, by concession of the state, the owners of the river bed adjoining their land to the thread of the stream, and that this ownership extends to any island

or dry land which may be formed thereon. This rule is affirmed by this court in *Norcross v. Griffiths,* 65 Wis. 599, 27 N. W. 606; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; and *Franzini v. Layland,* 120 Wis. 72, 97 N. W. 499.

Upon the trial the court dismissed the complaint, holding that the plaintiff and his assigns had shown no title to the island. Since there is no dispute but that plaintiff and his assignors were the owners of the river bank included within lots 1, 2, and 3 at the time of the alleged trespasses, under the established principle of the foregoing cases there can be no question as to their ownership of that part of the island situated on the river bed between this bank and the thread of the stream. There is nothing in the evidence to indicate but that this is an unsurveyed island formed upon that part of the bed of the river which is owned by the riparian proprietors. Under such circumstances, the original grant by the government carried with it the right of ownership to the island, in all respects as it did to the bed of the stream. The interest thus conveyed attaches and is appurtenant to the bank, and passes by conveyance of the title to the bank, unless it be separated therefrom by deed of conveyance. No such separation as to the lands in question is shown to have taken place. The result is that the plaintiff and his assignors were the owners of the island to the thread of the stream, and of the timber which the defendant cut and removed therefrom.

The court and counsel erroneously assumed that the practice which would be applicable to the trial of this case before a jury regulated the trial before the court after a jury had been waived. Under this view, defendant's counsel made a motion of nonsuit at the conclusion of plaintiff's testimony, which was entertained and granted; and, on such ruling, judgment dismissing the complaint was awarded. This practice has met with disapproval in repeated decisions of this court. Under sec. 2863, Stats. 1898, upon the trial of a ques-

tion of fact by the court its decision shall be made in writing, and the judge is required to state separately (1) the facts found by him; and (2) his conclusions of law thereon. Though noncompliance with the statute in this respect may not be reversible error, the statutory requirement is plain, and the decision in such cases should state the facts and give the conclusions of law. *Dietz v. Neenah,* 91 Wis. 422, 64 N. W. 299, 65 N. W. 500; *Yahr v. Joint School Dist.* 99 Wis. 281, 74 N. W. 779; *Farmer v. St. Croix P. Co.* 117 Wis. 76, 93 N. W. 830.

It is obvious from the record before us that the question of damages was not tried and determined, resulting undoubtedly from such misapplication of the rules of practice. Since the judgment must be reversed, and since the damages have not been determined, the trial court should proceed, upon the return of the case, to ascertain the damages. The court may, in its discretion, allow further proof upon this issue.

Attention is called to a clerical mistake in the record, in that the judgment recites that ROBERT G. SIEBECKER acted as presiding judge upon the trial of the case. The record shows that at the time of the trial E. RAY STEVENS was the judge of the circuit court for Dane county, and presided at the trial.

By the Court.—Judgment reversed, and the cause is remanded with directions to award judgment in plaintiff's favor for such an amount of damages as the court may determine.

MONSON, Appellant, vs. LEWIS, Respondent.

December 14, 1904—January 10, 1905.

Assault and battery: Justification: Burden of proof: Instructions to jury.

1. In an action against an overseer of highways for an assault and battery upon one working under him, an instruction given to the jury: "If the defendant in this case ordered and directed the plaintiff to let go of the scraper and quit work, and discharged him, and the plaintiff refused to let go of the scraper and refused to quit work, then, after such order and refusal, the defendant had a right to use proper and reasonable force to enable him to control the scraper in question and the jury must determine from all the evidence how much and what kind of force the defendant did in fact use," is *held* erroneous in that it admits of the construction that, if the defendant had discharged the plaintiff, the defendant was entitled to take the scraper from plaintiff's possession by force, if the force used was reasonable and proper to accomplish the purpose.
2. In such case, where the giving of the blow by defendant and the consequent damage was admitted, an instruction, that, in this case, as in all other civil cases, the burden is upon the plaintiff to establish the facts essential to his recovery by a preponderance of the evidence, is *held* erroneous, in that it might well be understood as meaning that the plaintiff, after proving the blow, was obliged to prove that there was no justification.
3. In assault and battery where the blow and consequent damage is admitted by the defendant, a *prima facie* case is made, and the burden then lies upon the defendant to prove facts constituting a justification therefor.

APPEAL from a judgment of the circuit court for Columbia county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an action to recover damages for an assault and battery by which the plaintiff's arm was broken. The answer alleged that at the time of the alleged assault the defendant was commissioner of highways, and that while engaged in his official duties the plaintiff assaulted him, and while lawfully defending himself from such assault he had a personal encounter with the plaintiff, but that the defendant acted only

in lawful self-defense, and used no more force than, under the circumstances, was necessary, and that, if the plaintiff's arm was broken, it was not through any wrongful act of the defendant, but by the wrongful acts of the plaintiff himself. The evidence shows that on the 3d of July, 1903, the parties were working on the highway (the defendant being superintendent of highways, and the plaintiff working under him), and that the plaintiff was handling an ordinary scraper, the horses attached to the scraper being driven by a third person; that the defendant was not satisfied with the manner in which the plaintiff handled the scraper, and an altercation arose between them, which resulted in a personal encounter. The plaintiff's testimony tended to show that he retained possession of the scraper, and the defendant attempted to take the scraper away from him, and struck his arm in the attempt, by which the arm was broken. The defendant's testimony tended to show that during the altercation the scraper came to a standstill, and that he then discharged the plaintiff from the work, and the plaintiff stood up and let go of the scraper; that thereupon the defendant took hold of both handles of the scraper, and the plaintiff then tried to take it away from him, and he (defendant) struck the plaintiff's arm in defending his possession of the scraper. There was a verdict and judgment for the defendant, and the plaintiff appeals.

Daniel H. Grady, for the appellant.

W. S. Stroud, for the respondent.

WINSLOW, J. There was no doubt, under the evidence, of the fact that the defendant struck the plaintiff and fractured his arm; but the principal disputed question seemed to be whether the defendant struck the blow while trying to take the scraper from plaintiff's possession, or whether the plaintiff had entirely let go of the scraper, and the defendant

had, without violence, taken it and struck the blow while the plaintiff was endeavoring to retake it. In the one case the act of defendant was an attempt to take the property by force from plaintiff's possession, and in the other case it was an attempt to defend his own possession. In this situation of the evidence, the following instruction was given:

"If the defendant in this case ordered and directed the plaintiff to let go of the scraper and quit work, and discharged him, and the plaintiff refused to let go of the scraper and refused to quit work, then, after such order and refusal, the defendant had a right to use proper and reasonable force to enable him to control the scraper in question, and the jury must determine from all the evidence how much and what kind of force the defendant did in fact use."

This instruction admits at least of the construction that, if the defendant had discharged the plaintiff, the defendant was entitled to take the scraper from plaintiff's possession by force, if the force used was reasonable and proper to accomplish the purpose. We do not understand this to be the law. It was held in *Barnes v. Martin,* 15 Wis. 240, that the owner of property which is in the peaceable possession of another has no right to retake the property by force. This principle is based upon public policy. It is in the interest of peace and public order. Any other rule would substitute the strong arm for the court of justice, and promote lawbreaking and violence. The right of the owner to recapture personal property is to be exercised only when he may peaceably do so, with the possible exception (not necessary to be discussed here) that, when the property has been momentarily taken from the owner by force or fraud, it may be lawfully retaken, if only reasonable and proper force be used. 2 Am. & Eng. Ency. of Law (2d ed.) 983; 3 Cyc. 1078. In the present case, plaintiff's original possession of the scraper was lawful, and, if he retained the possession continuously, the defendant was not justified in using force to take it away; but if the

plaintiff let go of it, and the defendant peaceably took possession, he might defend such possession with reasonable and proper force.

The court further charged the jury that "in this case, as in all other civil cases, the burden is upon the plaintiff to establish the facts essential to his recovery by a preponderance of the evidence." This might well be understood as meaning that the plaintiff, after proving the blow, was obliged to prove that there was no justification for it. This is not the law. The blow and consequent damage being admitted by the defendant, a *prima facie* case was made, and the burden lay upon him to prove facts constituting a justification therefor. *Timm v. Bear,* 29 Wis. 254; *Blake v. Damon,* 103 Mass. 199; 2 Greenleaf, Ev. (15th ed.) §§ 95–98.

By the Court.—Judgment reversed, and action remanded for a new trial.

SMITH, Appellant, vs. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY OF MINNEAPOLIS, MINNESOTA, Respondent.

December 15, 1904—January 10, 1905.

Life insurance: Assessment associations: Statutes: Impairment of contract obligations: Classification of members: Change to stipulated premium: Rights of assessment members: Findings: Proof of loss: Maturity of policy: Equity: Interest.

1. An assessment insurance association, assignor of defendant, entered into an agreement with plaintiff that, if he paid the specified assessments as called for up to January, 1902, it would pay him the amount of $2,000, provided eighty per cent. of an assessment, at the specified rates, on all its members, would produce that amount. Ch. 270, Laws of 1899, empowered corporations, like defendant's assignor, to exercise an election to thereafter make contracts to accept from their members, as the price

of their insurance, a stipulated sum at fixed periods instead of fixed sums at indefinite periods, as assessments might become necessary. Sec. 4, of said ch. 270, declared that the adoption of the privileges offered should in no way annul, modify or change any existing contracts or liabilities of such existing corporations, and that any and all such existing contracts and liabilities should continue in full force and effect the same as though such corporation had not reincorporated or qualified under that act. Defendant's assignor took the steps necessary to authorize it to do business under the provisions of ch. 270, and thereafter received no new members upon an agreement to pay assessments, but solely upon an agreement to pay a stipulated premium. Thereupon it induced a large number of its old members, holding assessment certificates, to surrender them and take out membership upon a basis of a stipulated premium, giving them as an advantage the rate of premium based upon their age at the time of originally becoming members. Afterwards defendant, by contract with its assignor, reinsured all of its insurance outstanding, took over all its assets and members and assumed its liabilities. Plaintiff never surrendered his original assessment certificate but performed all his part of that contract. *Held:*

(1) No impairment of plaintiff's contract was intended by ch. 270.

(2) Under ch. 270, as applied to pre-existing assessment contracts, there was no authority to make a classification of members, so that the moneys derived from those existing before the act were alone applicable to the insurance contracts held by them, while the moneys collected from members entering afterward must be exclusively devoted to their insurance.

(3) By taking the stipulated premium from its new members, the corporation must be held to have commuted and collected from them in advance their assessments to meet plaintiff's policy.

2. A finding of fact on any question is conclusive where no exception is reserved thereto.

3. Plaintiff's certificate in an assessment insurance association was not payable until sixty days after proof of loss. Within twenty days after maturity of the certificate, plaintiff commenced an action in equity to compel reinstatement of plaintiff's insurance notwithstanding a forfeiture declared by defendant, and such reinstatement was adjudged. *Held*, that it was entirely proper for a court of equity, having obtained jurisdiction over the parties and the controversy, to proceed to enter a money judgment on the reinstated insurance, it having matured before trial.

4. In such case, it not appearing when the proofs of loss would have been made but for defendant's repudiation of plaintiff's rights, the court adopts the date of service of the complaint as the time from which the sixty days should be computed, and allows interest from the later date.

APPEAL from a judgment of the circuit court for Dane county: WARREN D. TARRANT, Judge. *Modified and affirmed.*

For a number of years prior to 1893 there had existed a mutual insurance assessment company under the laws of Wisconsin, known as the Northwestern Mutual Relief Association of Madison, Wisconsin, hereinafter called the "Madison Company." That company reorganized under the provisions of ch. 440, Laws of 1891, and while so existing issued to the plaintiff its policy or certificate of membership dated February 24, 1893, agreeing, among other things, that upon January 18, 1902, he being then alive, they would pay to him eighty per cent of an assessment levied and collected therefor, not exceeding $2,000. The by-laws provided for assessment upon all members of the association upon the maturity of any certificate, according to a specified table graded according to the amounts of the respective policies and according to the age of the members. These assessments were, by the by-laws, to be divided, twenty per cent. to a reserve fund, out of which was to be paid the expenses of the company, and eighty per cent to a relief fund, out of which was to be paid the policyholder an amount not exceeding such eighty per cent, nor exceeding the stipulated maximum of his policy. In 1899, by ch. 270, Laws of 1899, authority was given to existing companies like the Madison Company, upon declaring their intention so to do, to conduct business upon a stipulated premium basis. At that time the Madison Company had a membership such that eighty per cent. of an assessment upon all its members, at the rates specified in the by-law tables, largely exceeded the maximum amount payable to a certificate

holder; but the amounts which had been accumulated into the reserve and relief funds at that time are not shown. The Madison Company took the steps necessary to authorize it to do business under the provisions of ch. 270, and thereafter received no new members upon an agreement to pay assessments, but solely upon the agreement to pay stipulated premium; and, shortly after such reorganization, induced a large number of its old members holding assessment certificates to surrender them and take out membership upon the basis of stipulated premium, but gave them, as an advantage resulting from their old membership, a rate of premium based upon their ages at the time of originally becoming members instead of at the higher rate which would have pertained to their ages at the time they made application for the change. It was stipulated, for the purposes of this case, that the average per capita assessment upon the assessment basis was eighty-two cents to meet each maturing certificate like plaintiff's, and that the average monthly stipulated premium was eighty-two cents.

On Aug. 29, 1901, the defendant, a Minnesota corporation, originally authorized to write insurance on the assessment plan, but afterwards on the stipulated premium plan, and which then had no members upon the assessment plan, entered into a written contract with the Madison Company, which recited that the two companies had agreed to consolidate, and that the defendant reinsured all of the insurance outstanding against the Madison Company, took all the assets of that company, and took over all its members as members of the defendant. The findings declare, without exception by the defendant, that the defendant "thereby assumed all liabilities under the terms and conditions of the plaintiff's certificate of membership above mentioned." There is no evidence as to the amount of the assets of the Madison Company, either in its reserve, relief, or mortuary funds, which were taken over by the defendant. At the time of such consolidation and

reinsurance there were about 3,400 members of the Madison Company, of whom about 300 held assessment certificates generally like the plaintiff's, and the rest held stipulated premium policies or certificates. Eighty per cent. of an assessment, according to the table of rates upon all of the members of the Madison Company existing on April 12, 1902, would have produced a sum largely in excess of the $2,000 maximum of plaintiff's certificate. Eighty per cent. of an assessment merely upon those members who held the assessment certificates would have produced $188.60. It was conceded upon the trial by the defendant's attorney that the defendant was willing to pay the amount which an assessment would produce on the membership of the Madison Company, but contended that no assessment could be levied upon the stipulated premium members. The trial court held in accordance with this contention, and rendered judgment in plaintiff's favor for the $188.60, with interest from January 20, 1902, from which judgment plaintiff appeals. There were also allegations, prayer, and judgment for relieving plaintiff from a forfeiture and requiring his reinstatement, from which neither party appeals.

Frank E. Parkinson, for the appellant, contended, *inter alia,* that a corporation cannot amend or change its charter or its by-laws or its contract of insurance, and thereby change or destroy the substantial rights of its members, unless such power is expressly reserved or unless the member shall give his express consent. *Morrison v. Wis. Odd Fellows' M. L. Ins. Co.* 59 Wis. 162; *Parish v. N. Y. Produce Exchange,* 169 N. Y. 34, 61 N. E. 977, 979; *Redky Citizens' Nat. G. L. F. & P. Co. v. Orr,* 27 Ind. App. 1, 60 N. E. 716; Stats. 1898, sec. 1748, subd. 5; *Benton v. Brotherhood R. R. Brakemen,* 146 Ill. 570, 34 N. E. 939; *Covenant Mut. L. Asso. v. Kentner,* 188 Ill. 431; *Seiverts v. Nat. Ben. Asso.* 95 Iowa, 710, 64 N. W. 671; *Langan v. Am. Leg. of Honor,* 70 N. Y. Supp. 663. When the appellant's right to eighty per cent.

of an assessment on all the members was once fixed in the by-laws and his certificate of membership, no retroactive by-law or other retroactive act of the company would be tolerated to destroy his right. *Peterson v. Gibson,* 191 Ill. 365; *Voigt v. Kersten,* 164 Ill. 314; *Covenant Mut. L. Asso. v. Tuttle,* 87 Ill. App. 309. Not even will legislative authority validate the act of any company attempting by by-law, or by any other act, to reduce or change the rights of its members. *Becker v. Farmers' Mut. F. Ins. Co.* 48 Mich. 610; *Peterson v. Gibson,* 191 Ill. 365; *Covenant Mut. L. Asso. v. Kentner,* 188 Ill. 431. The member's consent cannot be taken by implication. It must be founded upon express, positive, clear agreement. *Benton v. Brotherhood R. R. Brakemen,* 146 Ill. 570, 34 N. E. 939; *Philadelphia & R. R. Co. v. Love,* 125 Pa. St. 488; *Middlesex Turnpike Co. v. Swan,* 10 Mass. 384; *Starling v. Supreme Council,* 108 Mich. 440, 66 N. W. 340. Not only are amendments to the by-laws forbidden, but any and all other acts destroying contract rights are equally forbidden. *Becker v. Farmers' Mut. F. Ins. Co.* 48 Mich. 610; *Ins. Co. v. Connor,* 17 Pa. St. 136; *Great Falls Mut. F. Ins. Co. v. Harvey,* 45 N. H. 292; *Hamilton Mut. Ins. Co. v. Hobert,* 2 Gray, 543; *N. E. Mut. F. Ins. Co. v. Butler,* 34 Me. 451; *Revere v. Boston Copper Co.* 15 Pick. 351, 363; *Am. Bank v. Baker,* 4 Met. 164, 176; Angell & Ames, Corp. 339, 345. The "good of the order" does not warrant radical changes or change of contract rights, no matter how laudable the change. It is a question of reserved power and not of good faith. *Gaut v. Am. Leg. of Honor,* 107 Tenn. 603, 64 S. W. 1070; *Union Locks & Canals v. Towne,* 1 N. H. 44; *Middlesex Turnpike Co. v. Swan,* 10 Mass. 384; *Langan v. Am. Leg. of Honor,* 70 N. Y. Supp. 663; *State ex rel. Atty. Gen. v. Monitor Fire Asso.* 42 Ohio St. 555. The express power to raise money by assessment excludes every other power or plan. *Kennan v. Rundle,* 81 Wis. 212, 225; *Rochester Ins. Co. v. Martin,* 13 Minn. 59; *Farmers' & M.*

Bank v. Baldwin, 23 Minn. 198; *Dietrich v. Madison Relief Asso.* 45 Wis. 79; *Thomas v. R. R. Co.* 101 U. S. 71; *Jemison v. Citizens' Savings Bank,* 122 N. Y. 135; *Penn. R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 630; *Central Transfer Co. v. Pullman P. C. Co.* 139 U. S. 24. The legislature under no pretense whatever, directly or indirectly, has any power to invade the vested rights of a contract. And much less has it the power to authorize or to license the board of directors of a corporation to do so. U. S. Const., art. 1, sec. 9; *N. Y. & N. E. R. Co. v. Bristol,* 151 U. S. 556; *Lauman v. Lebanon Valley R. Co.* 30 Pa. St. 42; *Becker v. Farmers' Mut. F. Ins. Co.* 48 Mich. 610; *Covenant Mut. Life Asso. v. Kentner,* 188 Ill. 431; *The People v. Empire Mut. L. Ins. Co.* 92 N. Y. 105; *Peterson v. Gibson,* 191 Ill. 365. Consolidating corporations cannot enter into contracts limiting their liability on the obligations of the old corporations. It would be intolerable that one company by consolidating with another should acquire its rights and property and then escape its liabilities. *Cleveland, C. C. & St. L. R. Co. v. Prewitt,* 131 Ind. 557; *Lauman v. Lebanon Valley R. Co.* 30 Pa. St. 42; *Louisville, N. A. & C. R. Co. v. Boney,* 117 Ind. 501; *Polhemus v. Fitchburg R. Co.* 123 N. Y. 502; *Thompson v. Abbott,* 61 Mo. 176; *Grenell v. Detroit Gas Co.* 112 Mich. 70, 70 N. W. 413; *Columbus, C. & I. C. R. Co. v. Skidmore,* 69 Ill. 566; *Western Union R. Co. v. Smith,* 75 Ill. 496; *Indianapolis, C. & L. R. Co. v. Jones,* 29 Ind. 465.

For the respondent there was a brief by *Burr W. Jones,* attorney, and *Brown & Kerr,* of counsel, and oral argument by *Mr. Jones.*

DODGE, J. The Madison Company entered into an agreement with plaintiff that, if he paid the specified assessments as called for up to January, 1902, it would pay him the amount of $2,000, provided eighty per cent. of an assessment, at the specified rates, on all its members, would produce that

amount. Plaintiff has performed his part of the agreement, and defendant now contends, and the trial court has held, that he must be satisfied to receive the amount of an assessment on only about one tenth of all the members. The inquiry is at once suggested, what has occurred to accomplish such modification? Not much aid is offered by respondent's brief in discovering an answer to that query. The burden of the argument is cast in support of the contention that it might have been accomplished by a by-law or by a statute without invasion of constitutional prohibition against impairing obligation of contract; the former under reserved power to make or change by-laws, the latter under reserved power in legislature to change corporate charters. As to the first of these it is sufficient to note, first, that the reservation of power to change by-laws is expressly limited so that "the amount of the benefit shall not be reduced;" but, further, there is no evidence that the by-laws of the Madison Company ever were changed after 1892. If modification of plaintiff's contract rights is to be ascribed to any statute, none is suggested, except ch. 270, Laws of 1899, which, generally speaking, empowered corporations like the Madison Company to exercise an election to thereafter make contracts to accept from their members, as the price of their insurance, a stipulated sum at fixed periods instead of fixed sums at indefinite periods, as assessments might become necessary. In construing such statute it must be remembered that the state has only reserved power to modify the contract between itself and the corporation which is involved in the latter's charter or franchise, and that the constitutional prohibition against impairing the obligation of contracts was in full force in protection of any contracts which a corporation might have made with others. *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295; *Kenosha, R. & R. I. R. Co. v. Marsh,* 17 Wis. 13, 18. In the law in question, however, we find the legislature expressly declaring that the adoption of the privilege it offers to such

corporations "shall in no way annul, modify or change any existing contracts or liabilities of such existing corporation, and any and all such existing contracts and liabilities shall continue in full force and effect the same as though such corporation had not reincorporated or qualified under this act." (Sec. 4.) So we must conclude that the legislature intended no impairment of plaintiff's contract, and any discussion of its powers in that respect is but academic.

Counsel seem to assume that the act of 1899 authorized, if not required, an existing corporation, availing itself of the privileges thereby granted, to make a classification of its members so that the moneys it derived from those existing before the act were alone applicable to the insurance contracts held by them, while the sums collected from members entering afterward must be exclusively devoted to their insurance. They press upon our attention cases of which *Supreme Lodge K. P. v. Knight,* 117 Ind. 489, 20 N. E. 479, is perhaps the strongest, where a fraternal order, having at first only one class of members, afterward, by by-law, established other classes, each by itself mutual, but having no interest in the funds of any other class. Conceding, without deciding, that some such legislation or by-law might have been valid, we find nothing of the sort in the act of 1899, and, as already stated, we find no by-law. That statute, while preserving unimpaired and unmodified the agreement to pay to each old member the sum specified out of an assessment to be collected from all its members, authorized the corporation to contract with new members for payment of the sum estimated to be sufficient to meet all expenses and insurance obligations of the company, at an agreed time and rate, with power of further assessment if the estimate should at any time prove inadequate. In this is nothing to indicate that the sums so collected from the new members could not be applied to the old obligations of the corporation; no authority to so agree. True, it is required that there be accumulated and maintained

a reserve fund of certain minimum to meet the life policies written under the new system, but there is no requirement that the premiums upon such policies shall be entirely devoted to that end. They might be fixed at such a rate as to produce a greater amount. Nor was there any requirement that such reserve be accumulated exclusively from the stipulated premiums. Any receipts of the corporation, except on limited payment policies (section 7), might be carried to such reserve, including assessments collected from old policy holders. True, it is in evidence that no assessments ever have been so used, but we find nothing in the statute to prevent it. After most careful study of ch. 270 as applied to pre-existent assessment companies, we can find nothing to warrant any independence of one class of members from another. The methods of the collection of the price of the insurance differed, but all sums collected, by whatever method, became the funds of the corporation, subject to be used to discharge its obligations as they matured.

But it is said the plaintiff is only entitled to eighty per cent. of what the company can collect by an assessment, and, except as to the sum of $188.60, the company can collect nothing by an assessment, because it is bound by contract with the later members to acceptance of stipulated premiums; also it is objected that the by-laws existing when plaintiff's policy was issued declared that his only form of action should be to compel the levy of an assessment. These objections are superficial. If the contract had been made by an individual to pay the amount he could collect by assessment at a specified rate upon a certain list of persons, we apprehend no one would doubt his liability to a money action if it appeared that such individual had entered into a subsequent agreement with some of his other policy holders to accept certain stipulated amounts in satisfaction of their liability to assessment and had received such amounts. None would doubt that, in legal effect, he had collected the assessments. We cannot

view the situation of the Madison Company differently. By the act of 1899 it was given the power to make exactly such an agreement as that above supposed, and did make it with all the new members. Indeed, as to 2,960 of them, who had formerly been assessment members, it allowed them a credit or benefit because of their interest in a fund which had been accumulated out of the excess of assessments which plaintiff and others had paid up to that time. This, if done for the purpose of inducing them to withdraw from the assessment class in order to reduce the amount of plaintiff's demand against the company, would be such bad faith as to close the company's mouth to any defense based thereon. We think it plain that, by taking the stipulated premiums from its new members, the Madison Company must be held to have commuted and collected from them in advance their assessments to meet the plaintiff's policy.

It is further contended that, although the Madison Company might have been liable for the whole amount of plaintiff's certificate, the respondent is not so liable because of limitations imposed in the contract of consolidation made between the two corporations. We pass the question whether the defendant could take over all the property, mortuary funds, reserve, and the like of another insurance company, and at the same time, by contract with that company, limit or diminish the existing rights of its policy holders. In this instance the consolidation agreement expressly assumes all the liabilities of the Madison Company, subject only to the articles and by-laws of the defendant; but no such articles or by-laws were offered in evidence, except a statute of Minnesota which, perhaps, enters into them, and which provides that in case of consolidation the new company shall be liable for the payment of all obligations of the consolidated companies. Hence there is no proof to limit the complete assumption by defendant of the Madison Company's liability to plaintiff. Any such question is, however, foreclosed by the

finding of the fact that such assumption was made, since defendant reserved no exception thereto.

Since it is conceded that eighty per cent. of an assessment at the agreed rates upon all the members of the Madison Company still members of the defendant company, or even upon those who, as we hold, have already paid their assessments in the commuted form of stipulated premiums, would considerably exceed the $2,000 maximum of plaintiff's certificate, we can find no escape from the conclusion that defendant was and is liable to him for that amount.

Some objection is suggested to plaintiff's right to recover upon the certificate because, by its terms, it was not payable until sixty days after proofs of loss. No formal proofs of loss had been made, because the defendant declared the certificate forfeited and refused to send blanks for proofs. This action, however, was commenced within about twenty days after maturity of certificate, viz., February 7, 1902. This might be a serious obstacle to the maintenance of an action at law upon the certificate, but the fact is that this action was primarily one in equity to compel reinstatement of plaintiff's insurance notwithstanding a forfeiture in August, 1901, and such reinstatement is adjudged without appeal by defendant. For these reasons it is entirely proper for the court, in equity, having acquired jurisdiction over the parties and the controversy, to proceed to do complete justice, though part of the relief consists of mere money recovery, and, the money being due before trial, no insuperable obstacle to judgment for its recovery exists. We find no sufficient evidence as to when proofs would have been made but for defendant's repudiation of plaintiff's right; hence we adopt the date of the service of the complaint, February 20, 1902, since that document gave all needed information for adjustment. The actual payment should have been within sixty days from that date, to wit, April 21st; hence interest should then commence. *Laycock v. Parker,* 103 Wis. 161, 187, 79 N. W. 327.

By the Court.—Judgment appealed from is modified as of its date by changing the amount of damages from $206.45 to $2,265, and the total to $2,310.49, and as so modified is affirmed; appellant to recover costs in this court.

SIEBECKER, J., took no part.

ROBERTS and another, Appellants, vs. MCWATTY, Sheriff, and another, Respondents.

December 15, 1904—January 10, 1905.

Sales: When title passes: Instructions to jury: Evidence.

1. Whether or not title to a stock of goods sold has vested in the vendees must be ascertained from the terms of the agreement, if the phraseology employed clearly expresses it; but if it cannot be so ascertained, then resort must be had to the conduct of the parties as explained by commonly accepted usages in dealing with the subject-matter.
2. On the exchange of a stock of goods for lands, the written contract was not sufficiently explicit in its terms to declare the intention of the parties as to when title to the goods was to pass. In submitting this question to the jury, the court instructed them: "When anything is to be done by one who sells, or by the mutual concurrence of both parties, for ascertaining the price of goods, as by weighing, testing, or measuring them, or there is something indicating an intention to postpone the transfer of the property until the fulfillment of any specific conditions, the performance of such conditions is presumed to be a condition precedent to the transfer of the title to the property, and in *such case the title does not pass until such conditions have been performed.*" *Held*, that such instruction was erroneous in that it amounted to a direction that, if any of the conditions enumerated in the instruction were found to exist, then it was *conclusively* presumed that title did not pass until the conditions had been performed.
3. In such case, proof of such condition is received and submitted to ascertain whether the parties intended that title should pass when the agreement to sell was made, or at some subsequent stage of the transaction. Language in *Smith v. Wisconsin I. Co.* 114 Wis. 151, explained.

4. An instruction to the jury, in effect, that they must weigh and consider much, if not most, of the testimony that has been introduced, criticised, though *held* not so indefinite as to constitute grounds for reversal.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

In 1903 Romanzo Parks and John Parks were engaged in business at Middleton, Dane county, Wisconsin. They owned and had in their possession at this place a stock of hardware. They had engaged a Mr. Gray to secure a purchaser of the stock in bulk, or an exchange thereof for other property. Plaintiffs owned a tract of real estate in Price county. They and the Parks brothers negotiated for an exchange of properties, resulting in the making of a contract on June 26, 1903, whereby plaintiffs, in consideration of $5,600, to be paid them by R. Parks and J. Parks in the manner specified in the contract, did agree to and did sell them this real estate, bargaining and agreeing to convey a good title, free and clear from incumbrances and liens. It was further agreed as follows:

"In consideration of the foregoing agreement [R. Parks and J. Parks] hereby sell, assign, transfer and convey unto [plaintiffs] as part consideration hereof, a stock of hardware merchandise of good title and clear of lien or incumbrance, . . . the same to be applied on the purchase price, at the invoice price to be fixed by an invoice to be made commencing Monday, June 29, 1903, and completed as soon as possible, said stock to be invoiced under the supervision of some person expert in hardware prices to be selected by [plaintiffs], the balance of the purchase price to be paid as soon as the invoice is completed and not later than July 1st, 1903."

It was further agreed that the stock of hardware should not exceed in amount the sum of $2,800; that plaintiffs assumed the lease of the store building wherein the stock was kept for two months from July 1, 1903, and that the lease should be canceled by agreement with the owner before July

1, 1903, plaintiffs to pay two thirds and the Parks brothers one third of the cost of such cancellation; that any commission due Mr. Gray for bringing the parties to this exchange of properties together was to be paid by them in the same proportion, respectively, as the cost of cancelling the lease; and that plaintiffs were to and did pay Mr. Parks the expense of the trip to inspect the real estate. A Mr. Thorsness was selected by plaintiffs as expert in fixing the invoice price of the hardware. The taking of the inventory was commenced on the morning of June 29th, and continued to the evening of June 30th; Mr. Thorsness, the plaintiff *Roberts*, and the two Parks brothers taking part. On the following day, July 1st, Romanzo Parks took no part. The other parties attempted to continue invoicing, but disagreed as to the invoice price of articles, and did not finish invoicing on this day. The invoicing was then suspended, plaintiffs claiming that it was agreed to be resumed on the following Tuesday, July 7th. The other conditions of the contract as to the payment of rent and cancellation of the lease of the store buildng, the adjustment of Mr. Gray's commission, the furnishing of the abstract and delivery of a deed of the real estate, had not been executed at the time of the levy made by defendants. Plaintiffs, as the alleged owners of this stock of hardware under this contract, bring this action to recover the value of the goods so taken by defendants under an execution levy against Parks brothers. The defendants, acting in the capacity of sheriff, claim the right to seize this merchandise as the property of the Parks brothers for the benefit of their creditors, and assert that the Parks brothers are the owners thereof, and that the attempted exchange of this stock of hardware is fraudulent and void as to the creditors of Parks brothers. The action was tried before the court and a jury. A special verdict was rendered, finding that no fraud as to creditors of the Parks brothers was practiced by the parties in making the above contract; that the title to the stock did

not pass to plaintiffs when the contract was executed; and the title was in the Parks brothers at the time of the execution levy on July 11, 1903. Upon this verdict the court awarded judgment in defendants' favor, dismissing the action, and for costs. This is an appeal from such judgment.

R. F. Hamilton, attorney, and *Rufus B. Smith,* of counsel, for the appellants.

For the respondents there was a brief by *Bird & Gilman,* and oral argument by *Geo. W. Bird* and *F. W. Hall.*

SIEBECKER, J. The jury found that the transaction between plaintiffs and the Parks brothers was without fraud as to creditors. This leads to the inquiry: What effect is to be given the written contract between plaintiffs and the Parks brothers in reference to the passing of title of the stock of hardware covered by it? Whether or not the title to the goods sold vested in the vendees under circumstances like these depends upon the intention of the parties. This fact must be ascertained from the terms of the agreement, if the phraseology employed clearly expresses it; but, if it cannot be so ascertained, then resort must be had to the conduct of the parties as explained by commonly accepted usages in dealing with the subject-matter. As stated in *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359:

"The ultimate rule to be deduced from all the authorities is, however, the reasonable one, namely, that when neither the statute of frauds nor rights of creditors are involved, the title passes when the parties intend it to," and "that certain facts, or the absence of others, are held to confirm or refute the inference, as a fact, of an intent that title pass at any given state of the transaction;" citing a number of cases.

The court held that the contract on its face was not sufficiently explicit in its terms to declare the intention of the parties as to when title to the goods was to pass, and therefore resorted to proof of the facts and circumstances of the transaction to ascertain the intent of the parties upon this

subject. This ruling is correct, since the contract fails to disclose the intent when title to the stock of hardware should pass. In submitting this question for determination to the jury, the court instructed them as follows:

"When anything is to be done by one who sells, or by the mutual concurrence of both parties, for ascertaining the price of goods, as by weighing, testing, or measuring them, or there is something indicating an intention to postpone the transfer of the property until the fulfillment of any specific conditions, the performance of such conditions is presumed to be a condition precedent to the transfer of the title to the property, and in *such case the title does not pass until such conditions have been performed.*"

This instruction amounts to a direction that, if any of the conditions enumerated in the instruction were found to exist, then it is *conclusively* presumed that title did not pass until the conditions have been performed. This is not the legal effect of proof of such conditions. Proof of them is received and submitted to ascertain whether the parties intended that title should pass when the agreement to sell was made, or at some subsequent stage of the transaction. The instruction was evidently framed with a view to incorporating the rule expressed in the decision of *Smith v. Wisconsin I. Co.* 114 Wis. 151, 89 N. W. 829, wherein it is stated: "The performance of these conditions is presumed to be a condition precedent to the transfer of the property." These terms should not be read to declare that the existence of such conditions conclusively prove that title did not pass until they had been performed.

Another exception is urged to the following instruction: "In answering this question [6] you must weigh and consider much, if not most, of the testimony that has been introduced"—as misleading to the jury in permitting them to arbitrarily reject testimony which might be material. The instruction may not be so indefinite as to constitute reversible error, but we deem it best to call attention to it, so that the

uncertainty of its application to the evidence may be corrected. Since a new trial must be ordered, we do not deem it necessary to discuss other exceptions argued, because they will probably not arise upon another trial.

The case seems to have been tried and finally decided upon the theory that a determination of the question of fraud, and when title to this stock of hardware passed, decided all the issues between the parties. We are not advised by anything in the record whether counsel for the respective parties brought to the court's attention or whether the court passed upon the right of the defendants to seize this property for the benefit of the creditors of the Parks brothers, and take it from those in possession, while the invoice was being taken with a view to carrying out the contract of sale. If plaintiffs were in possession, either solely or jointly with the Parks brothers, the question as to what rights inhere in such possession may necessarily require determination to make a judgment conclusive as to the rights of all interested parties.

By the Court.—Judgment is reversed, and the cause is remanded for a new trial.

SANDON, Executrix, Appellant, vs. SANDON, by guardian *ad litem*, Respondent.

December 15, 1904—January 10, 1905.

Wills: Child adopted by testator after execution of will: Rights as distributee: Evidence: Declarations of testator: Order of adoption.

1. Under sec. 4024, Stats. 1898 (declaring that a child adopted pursuant to provisions of the preceding sections shall be deemed, for the purposes of inheritance and succession by such child, and all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and

purposes as if the child had been born in lawful wedlock of such parents by adoption), and sec. 2286 (providing that when a child shall have been born after the making of his parents' will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child), the rights under a will of a child legally adopted, are equivalent to those of a child born in wedlock.

2. E., nine days after the execution of a will, was legally adopted by the testator. The will was plain and unambiguous, and distributed the entire estate of the testator to certain beneficiaries, making no mention of the child subsequently adopted. *Held*, that as it could not be said that it was "apparent *from the will* that it was the intention of the testator that no provision should be made for" E., she was entitled to the same share of the estate as if the testator had died intestate.
3. In such case, extrinsic evidence may be received to aid in determining whether any doubtful language in the will shows an intention to make no provision for such adopted child, but it cannot be received to add such intention to the will.
4. In such case, declarations of testator concerning the making of a will and as to his intention concerning the adopted child's relation to his estate, are inadmissible.
5. Where an order of adoption strictly followed the directions as to its contents contained in sec. 4023, Stats. 1898, it is not insufficient because it did not, in terms, deprive the natural parents of "all legal rights whatsoever respecting" the child.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Robert Sandon died April 7, 1902, leaving a will executed May 14, 1894, which was duly probated September 3, 1902. He left surviving his widow and two married daughters; also an adopted daugher named *Ellen Victoria*, who had been adopted by due legal procedure May 23, 1894. By his will, after making sundry special bequests to his wife and daughters, his grandchildren, and certain religious societies, he left the residue of his property to his wife, whom he appointed his executrix. The will made no mention of the adopted

child, *Ellen.* On application by said adopted child to the county court for her distributive share of the estate, the county court ruled that she was entitled to the same share of the estate as if the testator had died intestate. This judgment was confirmed by the circuit court, and the executrix appeals.

The cause was submitted for the appellant on the brief of *R. M. Bashford* and *G. S. Martin,* and for the respondent on that of *Frank B. Wynne,* guardian *ad litem,* and *Olin & Butler,* of counsel.

To the point that under sec. 4024, Stats. 1898, adoption was equivalent to birth, within the meaning of the rule that marriage and birth of a child revokes a will, respondent cited *Flannigan v. Howard,* 200 Ill. 396, 65 N. E. 782; *Butterfield v. Sawyer,* 187 Ill. 598, 58 N. E. 602; *Hilpire v. Claude,* 109 Iowa, 159, 80 N. W. 332; *Sewall v. Roberts,* 115 Mass. 262, 267; *Buckley v. Frasier,* 153 Mass. 525, 527; *Warren v. Prescott,* 84 Me. 483, 24 Atl. 948; *Virgin v. Marwick,* 97 Me. 578, 55 Atl. 520; *Helms v. Elliott,* 89 Tenn. 446, 14 S. W. 930; *Bray v. Miles,* 23 Ind. App. 432, 54 N. E. 446; *Eckford v. Knox,* 67 Tex. 200, 2 S. W. 372; *Hartwell v. Tefft,* 19 R. I. 644, 35 Atl. 882; *In re Newman,* 75 Cal. 213; *Estate of Wardell,* 57 Cal. 484, 491; *Van Beck v. Thomsen,* 60 N. Y. Supp. 1094, S. C. 167 N. Y. 601; *Gray v. Holmes,* 57 Kan. 217, 45 Pac. 596; *Johnson's Appeal,* 88 Pa. St. 346; *Tirrell v. Bacon,* 3 Fed. 62; *Cofer v. Scroggins,* 98 Ala. 342, 13 So. 115, 117; *Power v. Hafley,* 85 Ky. 671, 4 S. W. 683.

WINSLOW, J. Sec. 2286, Stats. 1898, provides that "when any child shall be born after the making of his parent's will and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of

intestate estates unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." This section appeared in the Revised Statutes of 1849 (sec. 26, ch. 66), and has remained unchanged since that time. Secs. 4021–4024, Stats. 1898, provide for the adoption of children by legal proceedings, and sec. 4024 declares that "a child so adopted shall be deemed, for the purposes of inheritance and succession by such child, . . . and all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption," with an exception not affecting the present inquiry. This court held in *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, that a legal adoption under this statute was equivalent, save for the exception noted, to the birth of a child in wedlock. In the present case there is no question as to the legal adoption of the child, *Ellen*, after the making of the will. The will is plain and unambiguous, and distributes the entire estate of the testator to certain devisees and legatees, making no mention of the child subsequently adopted. In this situation, we are unable to see how it can be said to be "apparent *from the will* that it was the intention of the testator that no provision should be made for such child." There is nothing within the four corners of the written will which gives any intimation of the wish of the testator with regard to an after-born child. As said in *Bresee v. Stiles*, 22 Wis. 120, "we are not permitted to look outside of the will to ascertain the purpose of the testator upon this point." True, if a will contain ambiguous language, which may or may not refer to an unborn child, extrinsic evidence of the circumstances surrounding the testator when the will was made may be resorted to for the purpose of ascertaining the meaning and intention of such language. *Verrinder v. Winter*, 98 Wis. 287, 73 N. W. 1007. When that meaning is ascertained, it is

deemed in legal effect, to be the meaning expressed in the will itself. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786. The instrument, as written, has simply been construed. Nothing has been added or changed. *Lawrence v. Barber,* 116 Wis. 294, 93 N. W. 30. In brief, the rule is that such extrinsic evidence may be received to aid in determining whether any doubtful language in the will shows an intention, but cannot be received to add such intention to a will plain and certain upon its face. The evidence relied upon to show such intention was principally evidence of declarations by the testator concerning the making of a will, and as to intention concerning the child's relation to his estate; and it is very clear that such testimony is inadmissible, even if it were a case where surrounding circumstances were admissible to throw light upon the intent.

It is argued that the order of adoption is insufficient, because it does not, in terms, deprive the natural parents of "all legal rights whatsoever respecting" the child. This claim is untenable. It is true that sec. 4024, *supra,* provides that "the natural parents of such child shall be deprived by such order of adoption of all legal rights whatsoever respecting such child," etc., but it is quite certain that this is simply a statement of the legal effect of the order when made. Sec. 4023 specifically provides the contents of the order, and the directions therein contained were strictly followed in the order made.

By the Court.—Judgment affirmed.

JACOBS and others, Respondents, vs. QUEEN INSURANCE COMPANY OF AMERICA and others, Appellants.
SAME, Appellants, vs. NEW HAMPSHIRE FIRE INSURANCE COMPANY, Respondent.

December 16, 1904—January 10, 1905.

Appeal and error: Justices of supreme court: Equal division of justices: Affirmance: Rehearing: What justices participate therein: Fire insurance: Arbitration under standard policy: Evidence: Prejudicial error.

1. Where the justices of the supreme court are equally divided on a question vital to the result on the appeal, the judgment is affirmed *ex necessitate.*
2. In such case, no opinion will be filed.
3. Where, on appeal, a cause has once been decided, a rehearing will not be granted as to questions already considered, unless it is rendered necessary by a change in the views of one or more of the justices participating in the matter at first.
4. In an action on a standard policy of fire insurance, where it was established beyond reasonable controversy that the building was not totally destroyed, and it appeared that under the provisions of such policy the damages were adjusted by an arbitration, questions bearing on the amount of loss to the building caused by fire are not open for consideration upon the trial, in the absence of evidence warranting a finding that the arbitrators acted fraudulently, or outside their jurisdiction.
5. In such case, after evidence had been received that the city building inspector was duly authorized to impose upon the owner of a building the duty to take down dangerous walls, the court ruled out evidence of a notice given by such building inspector condemning as dangerous the front wall of the building and ordering it taken down. *Held*, that whether such ruling was proper or not it did not constitute prejudicial error.

APPEALS from judgments of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed on both appeals.*

Action to recover on five insurance policies. In March, 1902, *Frank W. Jacobs* and *Carrie J. Kitchell* by will of William Jacobs, deceased, became possessed of the title in

fee of certain real estate in the city of Milwaukee including the building thereon. *Joseph W. Hobbins* was the executor of such will. May 1, 1902, he procured of the defendant insurance companies policies of insurance on such building against loss by fire. Each of such policies ran to *Joseph W. Hobbins,* executor of the estate of William Jacobs, deceased, and was in the statutory form of this state. September 26, 1902, *Carrie J. Kitchell,* by an instrument duly witnessed and acknowledged so as to entitle the same to be recorded conveyed the undivided one half of such property to *Frank W. Jacobs* and said *Joseph W. Hobbins,* as trustees. This language was used in such instrument as to the title conveyed and the nature of the trust:

"Grant, bargain and sell to the parties of the second part as joint tenants, and not as tenants in common, and to their heirs, assigns and successors in trust, for the term of two years from this date," etc.; "to have and to hold the same as such joint tenants with all the privileges and appurtenances to the same building for the space of two years from this date, but in trust, nevertheless, for the following purpose only, that is to say: such trustees shall take possession of and hold, use and manage and control all my real estate herein described and any into which the same may be converted, and shall rent, lease and let the same, pay for all repairs, assessments, and taxes and insurance, and all lawful charges, and pay over to me all net rents and profits therefrom monthly. They may also use any money and securities or means of mine in their hands, for the purpose of improving my real property, . . . when so authorized in writing by both of us. Upon the joint authority and request in writing of the party of the first part, and *Frank W. Jacobs* duly signed by both . . . to sell and convey as well as to mortgage . . . said real estate. At the expiration of the said term of two years, or at my death prior to that time, or the death of either trustee, said trustee, or the survivor shall release and reconvey to me, or to such person or persons as I may by last will and testament designate and appoint, all their right, title and interest in such

real estate, ... and in any event the right, title and interest and claim of such trustees, shall, either upon the expiration of said term of two years, or my death, or the death of either of them, absolutely cease and determine."

January 21, 1903, while the title to the property remained as indicated by such trust deed, the building thereon, insured as aforesaid, was wholly or partially destroyed by fire. Thereupon it was claimed that the interests of *Frank W. Jacobs* and *Carrie J. Kitchell,* whether that of the latter was held by herself or by the trustees under said trust deed, were covered by said policies. The total amount of the face of the insurance policies was $15,000. Such proceedings were duly taken as were necessary to fix the liability of said insurance companies under said policies, if they were liable in any event under the circumstances. There being a disagreement between the parties interested as to the amount of the loss by due proceedings it was determined by arbitration to be $7,834.32. Plaintiff in due time commenced an action against each company to recover on the policy issued by it, the aggregate loss claimed being $9.949.47. The five actions were subsequently consolidated into one under sec. 2609*a*, Stats. 1898. The defendants answered severally alleging, among other things, the following: The policy insured against loss by fire *Joseph W. Hobbins*, as executor. He was not, either as executor or otherwise, at the time of the issuance of the policy or thereafter, up to and inclusive of the happening of the fire, the unconditional sole owner of the building insured, and the ground upon which it stood, by reason whereof the condition of the policy was breached and it was rendered invalid under this condition thereof:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than the unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The policy was also fatally breached as to such condition because the building was not on ground owned by the insured in fee simple, and because a material part thereof, to wit, the north twenty inches, as to the undivided one half, was owned in fee simple by parties other than those insured under the policy. The making of the trust deed heretofore mentioned fatally breached this condition of the policy:

"This entire policy, unless provided by agreement endorsed hereon or added hereto, shall be void, if any change other than by the death of the insured, takes place in the interest, title or possession of the subject of the insurance, except change of occupants, without increase of hazard, whether by legal process, or judgment, or voluntary act of the insured, or otherwise."

January 6, 1903, the policy was duly assigned and title thereto transferred by the Dane county court to *Frank W. Jacobs* and *Carrie J. Kitchell,* and was also assigned by said *Carrie J. Kitchell,* fatally breaching this condition of the policy:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void . . . if this policy be assigned before the loss."

The answer further pleaded the arbitration clause of the policy and appropriate proceedings thereunder whereby the loss upon the building was in due form, as alleged, determined by the arbitrators to be $7,834.32.

The trial resulted in a special verdict, as follows:

(1) Under the designation "*Joseph W. Hobbins,* Executor," the defendants, through their agents, at the time the policies were issued, understood that the interests of plaintiffs *Kitchell* and *Jacobs* in the property, were insured thereby.

(2) The building was not wholly destroyed by fire.

(3) The direct damage and loss to the building by fire was $7,818.45.

(4) The award by the arbitrators is valid.

Thereupon such proceedings were duly taken that a separate judgment was rendered in plaintiff's favor against each defendant for its due proportion of such loss. The necessary motions and objections were made, rulings taken thereon, and exceptions saved thereto to preserve for review the trial court's decision adverted to in the opinion. Each defendant appealed. Plaintiffs appealed from the judgment in their favor against the *New Hampshire Fire Insurance Company.*

A. L. Sanborn and *J. B. Sanborn,* for the plaintiffs.

For the defendants there were briefs by *Van Dyke & Van Dyke & Carter,* attorneys, and *John M. Olin,* of counsel, and oral argument by *W. D. Van Dyke.*

MARSHALL, J. In this case because of interest of near relatives in the result, the Chief Justice deemed it improper for him to participate. The remaining justices being equally divided on a question vital to the result on defendant's appeals, the judgments as to such appeals must be affirmed *ex necessitate.* Justices WINSLOW and DODGE concur with the decision of the trial court, while Justice SIEBECKER and the writer entertain a different opinion. In harmony with an unwritten rule for the treatment of such situations no opinion will be filed.

It seems best to say for the guidance of counsel that there is a further unwritten rule in this court, that a case once decided will not be opened as to questions already considered, unless that is rendered necessary by a change in the views of one or more justices, participating in the matter at first.

On plaintiffs' appeal error is assigned because the court ruled out a notice given by the building inspector of Milwaukee condemning as dangerous the front wall of the building and ordering it to be taken down. It was claimed that such dangerous character was caused by the fire. Prior to such offer evidence was received showing that the inspector was duly authorized in such case to impose upon the owner of a

building the duty to take down dangerous walls. The bearing of the evidence was on the amount of loss to the building caused by the fire.

It seems to have been established beyond reasonable controversy that the building was not totally destroyed and therefore under the terms of the policy the damages to the structure were a proper subject for adjustment by arbitration, and were so adjusted. That being the case no question in regard to the matter was open for consideration upon the trial in the absence of evidence warranting a finding that the arbitrators acted fraudulently or outside their jurisdiction. *Fox v. Masons' F. A. Asso.* 96 Wis. 390–395, 71 N. W. 363; 4 Joyce, Insurance, §§ 3248–3253. On all questions of fact in that regard the jury found for the defendant and it is conceded that such finding was warranted on the evidence produced. An examination of the record leads to the conclusion that no other finding could fairly have been made and that the evidence rejected, had it been introduced, would not reasonably have changed the result. Therefore the ruling complained of whether proper or not worked no harm to the plaintiff and constitutes no prejudicial error.

By the Court.—On plaintiffs' appeal the judgment is affirmed, and on defendant's appeals the judgments are affirmed.

CASSODAY, C. J., took no part.

SWENSON, imp., Appellant, vs. FLINT and others, Respondents.

December 16, 1904—January 10, 1905.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided, the judgment appealed from is affirmed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to foreclose a mechanic's lien on building and property of defendant *A. S. Flint;* plaintiff claiming as a subcontractor under the defendant *Harrison,* and claiming personal judgment against him. Judgment was granted for personal recovery of the amount claimed against *Harrison,* and denying any lien as against *Flint's* property. From such denial of lien the plaintiff *Swenson* appeals.

For the appellant there was a brief by *Tenneys, Hall & Swansen,* attorneys, and *Burr W. Jones,* of counsel, and oral argument by *Mr. S. T. Swansen* and *Mr. Jones.*

For the respondent *Flint,* there was a brief by *C. N. Brown,* attorney, and *Olin & Butler,* of counsel, and oral argument by *Mr. H. L. Butler* and *Mr. Brown.*

PER CURIAM. By reason of his previous relations with this case as circuit judge, Mr. Justice SIEBECKER is unable to participate in its consideration. The other justices being equally divided in opinion, the judgment appealed from is affirmed.

Bovo, Respondent, vs. D. M. FULMER LUMBER COMPANY, Appellant.

December 16, 1904—January 10, 1905.

Sales: Cause of action: Special verdict: Judgment: Evidence.

Where, in an action for the purchase price of timber, the court found that plaintiff did not own the timber, but failed to find as to whether plaintiff had become the owner of the proceeds of the sale, and the evidence as to plaintiff's ownership of such proceeds was in sharp conflict, it was error to award judgment for plaintiff.

APPEAL from a judgment of the circuit court for Florence county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover a balance due on a sale of cedar timber to the defendant corporation. It is alleged by the plaintiff that he sold and delivered to defendant forty-nine car loads of cedar timber at an agreed price of $3,556.51, and that there is due him the sum of $2,785.44, which defendant refuses to pay. The defendant corporation admits the purchase of the timber from plaintiff, but avers that fourteen car loads of the timber so purchased was the property of one Fred Alberts, and that it has paid Alberts therefor; that the balance due plaintiff for timber owned by him, so sold to defendant, is $1,736.34. The court declared by the answer of the first question of the special verdict that plaintiff was not the owner of the fourteen car loads of timber included in plaintiff's claim, and referred to as the Alberts timber, at the time it was sold to defendant. It appears that the fourteen car loads of timber were cut and prepared for market by one Fred Alberts from plaintiff's land, and under an agreement between plaintiff and Alberts stipulating that Alberts was to pay plaintiff $50 stumpage, and $5 per car as commission for selling the timber. It also appears that plaintiff informed the representatives of the company with whom he negotiated in making the sale of the timber that such an agreement existed between him and Alberts. Plaintiff stated the facts of this arrangement between himself and Alberts to Mr. Hayes, defendant's representative and inspector of the timber when it was loaded for shipment to defendant. It also appears that Alberts gave defendant notice after shipment of the timber not to pay plaintiff for the fourteen car loads, and that he claimed a right to the proceeds. Defendant thereafter refused to pay plaintiff for these fourteen car loads, claiming that Alberts asserted a right to the proceeds, and avers that it subsequently took a bill of sale of this timber from Alberts, and has paid him the full amount due there-

for. The jury found that defendant did not pay Alberts for this timber, as claimed by it. The evidence tends to show that plaintiff made advances to Alberts to enable him to cut and market this timber. After considerable negotiation in an attempted settlement of disputes between plaintiff and Alberts, the following writing was executed and delivered:

"In consideration of the sum of two hundred and fifty-three dollars ($253.00) to me in hand paid by *Jule Bovo,* the receipt whereof is hereby acknowledged, I do hereby acknowledge full payment and satisfaction of any and all claims or demands wheresoever due me from said *Jule Bovo.*

"Dated Jany. 2nd A. D. 1903.

"In presence of "FRED his X mark. ALBERTS.

"FRANK WARING.

"MAX SELLS."

The court awarded judgment on the special verdict in plaintiff's favor for the full amount of the purchase price of forty-nine car loads of timber, less the payments admitted to have been made to plaintiff. This is an appeal from this judgment.

For the appellant there was a brief by *Max Sells* and *A. W. Shelton,* and oral argument by *Mr. Shelton.*

For the respondent the cause was submitted on the brief of *Eastman & Marteneau,* attorneys, and *Cook & Pelham,* of counsel.

SIEBECKER, J. Under the evidence and pleadings, the question arose between the parties to this action whether plaintiff was entitled to recover the price of fourteen car loads of timber alleged to have been sold and delivered by him to defendant. In the month of March, 1902, plaintiff made an agreement with defendant, selling to it all the timber to be cut during the following season from certain land owned by him, at the price specified, and to be shipped as agreed. At the time of making this agreement, plaintiff informed defendant that he handled a portion of such timber on com-

mission for one Alberts, who had agreed to cut and prepare it for market under an agreement whereby plaintiff was to receive $50 for the stumpage, and $5 per car load for selling it. The court held that fourteen car loads of the timber included in plaintiff's demands in this action were not owned by plaintiff at the time this sale was made to defendant. Whether plaintiff became the owner of these fourteen car loads of timber after such sale, or of the proceeds thereof after delivery, we are not informed. There is no averment in the pleadings on the subject, nor was there any determination of this question by the court or jury under the proof.

There is evidence in the case tending to show that plaintiff had sold this timber to one Alberts, and that he treated it as Alberts' timber at the time of its shipment and delivery to defendant. It also appears that Alberts made claim of ownership, and so notified defendant after delivery, and claimed that payment of the purchase price should be made to him. On the other hand, there is evidence supporting the contention that Alberts had released his interest and claim to the proceeds of the sale of this timber to plaintiff. The pleadings, as framed, do not aver a transfer of the proceeds of the fourteen car loads of timber to plaintiff, nor was there a determination of this question by the special verdict. The court, however, awarded judgment in plaintiff's favor for the full amount due, including the fourteen car loads in dispute. Since the court found that plaintiff did not own this timber when defendant purchased it, and there was no finding that plaintiff subsequently became the owner of the proceeds of sale, the only other theory upon which judgment could be awarded in plaintiff's favor is that the evidence showed without dispute that he was entitled to the amount due for the fourteen car loads. As above stated, this is not the case, since the evidence is in sharp conflict upon this question. Under such circumstances, it was error to award plaintiff judgment for the amount due on the sale of the fourteen car loads of

timber. This requires that a new trial be granted, and obviates any necessity of considering the exceptions to the charge, and to the refusal of the court to change the answer to question No. 2 of the special verdict.

By the Court.—Judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BADGER LUMBER COMPANY, Respondent, vs. STERN, Appellant, BATES, Garnishee.

December 16, 1904—January 10, 1905.

Appeal and error: Who may appeal: Garnishment of debt due jointly to defendant and another: Married women: Answer of garnishee: Judgments.

1. It is competent for the principal defendant to appeal from a judgment against a garnishee.
2. A debt due jointly to the principal defendant and another cannot be reached by garnishment in an action against such defendant alone.
3. Such rule applies to an indebtedness owing by the garnishee to a husband and wife.
4. The answer of a garnishee alleged that he "was indebted to the defendant S.," but that was immediately followed by the allegation that "such indebtedness" was upon a written contract, wherein and whereby he "agreed to pay said S. and Anna S. (his wife) the sum," etc. *Held*, that such statement of fact superseded the general conclusion of indebtedness to S., and it was error to enter judgment thereon against the garnishee.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

It appears from the record that December 15, 1903, the plaintiff commenced this action against the defendant *Richard Stern,* and at the same time garnished the defendant Bates; that Bates, as such garnishee, answered to the effect that he, as such garnishee, was indebted to the defendant

Richard, and that such indebtedness was incurred May 21, 1903, by his entering into a written agreement with *Richard Stern* and Anna Stern, his wife, wherein and whereby he agreed to pay said *Richard* and Anna Stern $300, for which they, when such sum should be fully paid, were to convey to him the forty acres of land therein described; that said sum was to be paid in twelve several instalments, of $25 each, payable on the 21st day of May, July, September, November, January, and March of each year, until fully paid, the first instalment being payable May 21, 1903; that four of such payments had been made prior to the service of the garnishee summons, and that eight payments, aggregating the sum of $200, remained to be paid; that he had the option of paying at any time; that such indebtedness was absolute, and not subject to any contingency, but was not to bear interest; that otherwise he had no property or effects belonging to *Richard Stern.* Judgment by default having been entered in favor of the plaintiff and against *Richard Stern* for $270.05, with costs, and the answer of the garnishee not having been traversed, but accepted and taken by the plaintiff as true, and the cause having been submitted and tried upon such answer, thereupon the court found that Bates was liable to the plaintiff for the amount of such indebtedness in the sum of $200, and ordered judgment to be entered in favor of the plaintiff and against Bates for that amount, less $3 for costs in favor of Bates as such garnishee. From the judgment entered against the garnishee accordingly, the principal defendant, *Richard Stern,* brings this appeal.

For the appellant there was a brief by *Weed & Van Doren,* and oral argument by *F. C. Weed.*

F. Y. King, for the respondent.

Cassoday, C. J. It was competent for the principal defendant, *Richard,* to appeal from the judgment against the garnishee. Sec. 2765, Stats. 1898; *Veitch v. Cebell,* 105 Wis. 261, 81 N. W. 411; *Schomberg H. L. Co. v. Engel,* 114

Wis. 273, 90 N. W. 177. Whatever may be the rule in other jurisdictions, it is well settled in this state that a debt due jointly to the principal defendant and another or others cannot be reached by garnishment in an action against such defendant alone. *Singer v. Townsend,* 53 Wis. 226, 10 N. W. 365. This is in harmony with the great weight of authority. We cite a few cases only: *Trickett v. Moore,* 34 Kan. 755, 759, 10 Pac. 147, and cases there cited; *Hawes v. Waltham,* 18 Pick. 451; *Stillings v. Young,* 161 Mass. 287, 37 N. E. 175; *Kennedy v. McLellan,* 76 Mich. 598, 43 N. W. 641; *Hanson v. Davis,* 19 N. H. 133. The reason for the rule is that such principal "defendant could not alone have maintained a suit therefor against the garnishee." 14 Am. & Eng. Ency. of Law (2d ed.) 798, and cases there cited. With the extended rights given to married women by our statutes, we perceive no reason why the same rule should not apply to an indebtedness owing by the garnishee to husband and wife. Secs. 2341–2345, Stats. 1898; *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65; *Barker v. Lynch,* 75 Wis. 624, 44 N. W. 826; *Gallagher v. Mjelde,* 98 Wis. 513, 74 N. W. 340, and cases there cited; *Kendall v. Beaudry,* 107 Wis. 180, 83 N. W. 314. True, the answer of the garnishee states, as a conclusion, that he "was and is now indebted to the defendant *Richard Stern*;" but that is immediately followed by stating the fact that "such indebtedness" was upon the written contract mentioned, wherein and whereby he "agreed to pay said *Richard Stern* and Anna Stern the sum of $300," etc. Such statement of fact supersedes such general conclusion.

By the Court.—The judgment of the circuit court against the garnishee is reversed, and the cause is remanded with directions to dismiss the garnishee action.

A motion by the respondent to set off judgment for costs in this court against judgment in circuit court was argued by *F. C. Weed* for the appellant, February 21, 1905. The motion was denied March 14, 1905.

SHERRY, Respondent, vs. MADLER, Appellant.

December 17, 1904—January 10, 1905.

Sunday contracts: Ratification: Evidence: Appeal: Assignments of error: Mechanics' liens: Amendments to conform to proof: Evidence: Pleading: General denial: Retrial, limitation of issues: Measure of damages.

1. Where a contract is void because executed on Sunday, acts of subsequent recognition do not constitute ratification of the original contract. Such contract is absolutely void and incapable of ratification.
2. Where a contract to build a house is void because executed on Sunday, and the house has been built, the contractor, on proper pleadings, may prove either that a new contract was made, or, in the absence of such contract, the reasonable value of the labor and materials which went into the house.
3. Where appellant does not assign error to the making of a specific finding, the supreme court is relieved from any consideration of whether the finding is supported by the evidence, and will accept the finding as a fact.
4. Where, in an action to foreclose a mechanic's lien, neither the claim for the lien nor the complaint set forth the contract on which plaintiff finally recovered, nor was any formal amendment of either document made, but the evidence in respect to such contract was without serious dispute, and was admitted without objection, both the claim and complaint may be considered as amended to conform to the proofs as effectually as if formal amendments had been ordered.
5. In an action to foreclose a mechanic's lien on a house agreed to be built according to agreed plans and specifications, it is error to rule out testimony tending to prove that certain parts of the work and materials did not accord with the requirements of the plans and specifications, and that the house was of less value on account of such defaults.
6. In an action to foreclose a mechanic's lien, the original complaint was upon *quantum meruit*, but was, in effect, amended by the action of the court into a complaint alleging performance of a contract to build a house according to certain plans and specifications for a fixed sum. *Held*, that a general denial, pleaded to the allegations of the original complaint, put in issue the question whether the house had been completed according to the plans and specifications agreed upon, and allowed the defendant to prove nonperformance.

7. In an action to foreclose a mechanic's lien, the trial court found the original contract for building a house was invalid, and that a subsequent contract was made. On reversal for erroneously excluding evidence tending to prove that certain parts of the work and material did not accord with the requirements of the plans and specifications, and that the house was of less value on account of such defaults, *held:*

(1) The question as to the validity of the original contract and as to the making of the subsequent contract must be regarded as settled by the findings, and not open to be disturbed.

(2) Further evidence should be taken on the following questions: First. Was the house built in compliance with the plans and specifications furnished? Second. If not built in exact compliance with them, was there such substantial compliance in good faith as would entitle the plaintiff to recover the contract price, less proper deductions for defects and defaults in performance?

8. In such case, if the latter question is answered in the affirmative, the rules by which proper deductions may be ascertained are:

(1) In case of entire neglect to furnish an item of labor or material, or in case of a defect which may easily be remedied without taking down and reconstructing a substantial portion of the building, the allowance should equal the reasonable expense of supplying or correcting the defect.

(2) In case of a defect which could only be remedied by taking down and reconstructing some substantial portions of the building, the allowance should be the amount which the building is worth less, by reason of the defect, than the contract price.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to foreclose a mechanic's lien for building a dwelling house. The complaint, as well as the petition for lien, alleged that the plaintiff built a dwelling house for the defendant in the city of Appleton between September 1, 1902, and February 13, 1903, at the special instance and request of the defendant, and furnished labor and material therefor at the agreed price of $2,150, and that said labor and materials were reasonably and fairly worth said sum of $2,150, and that the balance unpaid amounted to the sum of $1,352.60. The defendant's answer, after admitting that

the plaintiff performed certain work and labor and furnished certain materials in the construction of said dwelling house, alleged that the same were all furnished under and pursuant to a written contract whereby it was agreed that said house was to be built for the gross sum of $1,488, which contract also contained an agreement by the plaintiff waiving all right to file a mechanic's lien thereon. The answer also denies each allegation of the complaint not expressly admitted. The action was tried by the court, and findings made to the effect that the written contract alleged by the defendant was executed upon Sunday, August 24, 1902, and hence was void; that certain transactions afterwards occurred between the parties during the building of the house by which the said void contract and the plans and specifications attached were recognized, said transaction consisting of the giving of a check by the defendant in part payment October 6, 1902, upon which check were the words, "Appleton House. Contract price, $1,488.00, complete per plans and specifications;" that a receipt for such check was given by the plaintiff's foreman, in which the receipt of the money was acknowledged "in payment of account contract price, $1,488.00, for labor and material to build complete house;" a statement of the amount due November 14, 1902, was mailed by plaintiff's foreman to the defendant, in which statement defendant was charged with the contract price of $1,488; that in February, 1903, the plaintiff called on the defendant, and sought for a settlement and payment of his claims for building the house on the basis of $1,488 as the contract price therefor; that in correspondence between the parties said sum was recognized as the contract price, and the plans and specifications attached to the original contract were used in the course of the building. The court found further that by these acts the parties "did, in effect, and as matter of law, make and enter into a new and independent contract for the erection and construction of said house by the plaintiff at the sum of $1,488, and

that sum must be the basis of the amount of the claim in this action." The court also found that the defendant was entitled to credit for the sum of $752; that the plaintiff's original claim amounted to the sum of $1,488, being the said contract price, and extras amounting to $55.50, making in the aggregate $1,543.50, and leaving a balance due to the plaintiff of $745.90, with interest since February, 1903. For this amount a judgment of foreclosure of mechanic's lien was awarded and rendered, and the defendant appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Wm. C. Quarles,* of counsel, and oral argument by *Wm. C. Quarles.*

For the respondent there was a brief by *A. M. Spencer* and *John Bottensek,* and oral argument by *Mr. Bottensek.*

WINSLOW, J. It is admitted by appellant that the written contract for building the house was in fact executed on Sunday, but it is claimed that it was validated by the subsequent acts of the parties set forth in the statement of facts, which recognized its existence. This contention is effectually answered by the decision in the case of *Vinz v. Beatty,* 61 Wis. 645, 21 N. W. 787, where a lease of a mill and house was executed on Sunday, and possession taken under it, and rent paid under its terms for a considerable time. Notwithstanding these acts of subsequent recognition, it was held that they constituted no ratification of the original lease, because it was absolutely void, and hence incapable of ratification. A new contract might be made between the parties, either expressly or by implication, from their dealings; but this would be an independent contract, and not a ratification of that which was void. The cases relied on by the appellant to sustain his contention, such as *Schmidt v. Thomas,* 75 Wis. 529, 44 N. W. 771, will be found upon examination to be cases where such new and independent contract was made on a subsequent secular day. It follows that the trial court

was right in holding that the original building contract, including the clause waiving the right to file a lien, was and remained void, notwithstanding the subsequent dealings of the parties. Such being the case, the plaintiff would be entitled on proper pleadings to prove either that a new contract was made, or, in the absence of any such contract, to show the reasonable value of the labor and materials which went into the house. The court found that by their subsequent dealings the parties did make a new and independent contract for the construction of the house (according to the copy of the plans and specifications sent to plaintiff by defendant August 26 and 28, 1902, as we construe the finding) for the old contract price of $1,488. There was no provision for the waiver of liens in this new contract, nor was there any evidence from which it could be found that such a provision was agreed upon. The appellant does not assign error in this court upon the making of this finding; hence we are relieved from any consideration of the question whether it is supported by the evidence, and we accept it as a fact.

The statute requires that the claim for lien contain "a statement of the contract or demand upon which it is founded" and also requires that the complaint "set forth the substance of the contract under which such work was done." Secs. 3320–3322, Stats. 1898. Neither the claim nor the complaint set forth the contract on which the plaintiff finally recovered, nor was any formal amendment of either document made; but as the evidence on which the court based its finding of a new contract was without serious dispute, and admitted without objection, we conclude that the court considered both claim and complaint to be amended to conform to the proofs as effectually as if formal amendments had been ordered.

We now reach the last contention made by the appellant. He offered testimony tending to prove that certain parts of

the work and materials did not accord with the requirements of the plans and specifications, and that the house was of less value on account of such defaults; but substantially all such testimony was rejected, and this ruling is now assigned as error, and, we think, rightly so. It is true that there was no affirmative allegation in the answer of defective workmanship, but there was, in effect, a general denial. While the original complaint was upon *quantum meruit,* it was, in effect, amended by the action of the court into a complaint alleging performance of a contract to build the house according to certain plans and specifications for a fixed sum. We are unable to see why the general denial already pleaded did not put in issue the question whether the house had been completed according to the plans and specifications agreed on, and allow the defendant to prove nonperformance. *Moritz v. Larsen,* 70 Wis. 569, 36 N. W. 331. But, even if there were necessity for a further specific pleading by the defendant, the circumstances were such that a proper amendment to support the proof offered should have been ordered in order to meet the new complaint which the court, in effect, imported into the case. This rejection of evidence necessitates reversal of the judgment. It will not be necessary to retry the question as to the validity of the original contract, nor the question as to the making of the subsequent contract. These matters must be regarded as settled by the findings, and are not to be disturbed. But the following questions are still open, and further evidence must be taken upon them as the parties are advised: First: Was the house built in compliance with the plans and specifications furnished by defendant to the appellant August 26 and 28, 1902? Second. If not built in exact compliance with them, was there such substantial compliance in good faith as will entitle the plaintiff, under the principle stated in *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515, to recover the contract price, less proper deduction for defects

or defaults in performance? If this latter question be answered "No," then there can be no recovery; but, if answered "Yes," then the rules by which proper deductions are to be ascertained are important, and these may be stated as follows: In case of entire neglect to furnish an item of labor or material, or in case of a defect which may be easily remedied without taking down and reconstructing a substantial portion of the building this allowance should equal the reasonable expense of supplying or correcting the defect. In case of a defect which could only be remedied by taking down and reconstructing some substantial portion of the building the allowance should be the amount which the building is worth less, by reason of the defect, than the contract price. If the defendant desires to amend his answer to fully present these questions in an orderly manner, such amendments should be allowed without terms.

By the Court.—Judgment reversed, and action remanded for further proceedings in accordance with this opinion.

LOYD, Appellant, vs. PHILLIPS and wife, Respondents.

December 17, 1904—January 10, 1905.

Equity: Written instruments: Negligence of grantee: Failure to read: Cause of action: Adequate remedy at law.

1. Plaintiff alleged, among other things, that in exchanging land he deeded his land to defendant and gave him a mortgage of $2,500 on lands conveyed to plaintiff, defendant representing that there was a small incumbrance on the lands conveyed to plaintiff which he would promptly pay; that when plaintiff demanded a warranty deed, defendant's wife exhibited a blank with full covenants, and relying on her promise to prepare such a deed, accepted, without reading, the deed prepared by her, which deed excepted mortgage indebtedness from the covenant against incumbrances; that, as soon as the deed was delivered

to plaintiff, he permitted defendant to take it on his promise to have it recorded and to "fix up" the incumbrances, and that defendant had attempted to sell the $2,500 mortgage, refused to discharge the indebtedness as agreed, and was insolvent. *Held*, that the circumstances excusing plaintiff's failure to examine the deed before accepting it were sufficient to prevent its being held, as matter of law, that he was inexcusably negligent in that regard, precluding any successful appeal on his part to the courts for redress.

2. Such facts do not show a mere breach of contract, for the redress of which legal remedies are amply sufficient, but show a situation where equity jurisdiction should lend its aid in the matter.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The plaintiff, for a cause of action, pleaded the following, in effect:

January 12, 1903, plaintiff owned lands in Outagamie county, Wisconsin (specifying the same) of the value of $3,000, incumbered to the amount of $1,000. Defendant *John M. Phillips* then owned lands in the same county (specifying the same). The latter represented to the former that there was a small incumbrance on his land, which, in the event of his trading the same for plaintiff's land, he would fix up within a few days. Relying thereon plaintiff made a verbal agreement with the defendant to the effect that the latter should clear the incumbrance from his land and convey the same to the former in consideration of a mortgage back to secure payment to him by plaintiff a specified sum in the future of $2,500 and a clear deed of the latter's land. Upon said agreement being made defendant suggested a meeting at his house to consummate the same, he to obtain the presence of a justice of the peace to take the acknowledgment of the papers. Plaintiff acting thereon visited defendant's house, whereupon the latter's wife, said defendant, *Ada Phillips*, undertook to draft the deeds and mortgage, suggesting that she had written the descriptions of her husband's land many times and was better able to draw the deed thereof correctly

than any one else. Thereupon plaintiff's wife in his behalf said that a full warranty deed according to a form exhibited by her was what he required, to which said *Ada Phillips* replied that she would make the deed that way. Thereupon she prepared the papers for execution. That being done all were executed, A. G. McKee, a justice of the peace, taking the acknowledgments. Plaintiff, relying upon the assurances given by said *Ada Phillips,* as aforesaid, completed the trade without reading the deed given him by said *John M. Phillips.* As soon as the papers were executed said *John M. Phillips* was permitted to take them into his possession upon his promise that he would send them for record and fix up the incumbrance upon the property conveyed to plaintiff so that the same would be free from all incumbrances. The latter did not again see the deed given to him until some time in the spring of 1903, when he discovered that instead of being in accordance with the understanding, the covenant against incumbrances excepted mortgage indebtedness. Whereupon he applied to said *John M. Phillips* to clear off such indebtedness and was assured that it would soon be done. Had plaintiff known when the papers were executed that the deed to him was not drawn in accordance with the agreement, he would not have completed the trade. There were in fact upon the property conveyed to him two mortgages, one for $600, and one for $1,400. Said *John M. Phillips* has refused and neglected to pay off and discharge the same as he agreed to do, and there now remains a mortgage indebtedness of $1,400. He is financially irresponsible. He has made efforts to sell the said $2,500 mortgage, and is so circumstanced that if plaintiff is compelled to pay the $1,400 mortgage indebtedness, aforesaid, he will suffer irreparable damage.

Upon such facts plaintiff prayed for judgment reducing the $2,500 mortgage to the amount of the incumbrance upon the land conveyed to him, as stated. He further prayed for an injunction restraining said *Phillips,* pending a decision

in the case, from selling the said $2,500 mortgage, and further prayed for such additional relief as to the court might seem just.

The defendants demurred generally to the complaint. The demurrer was sustained and plaintiff appealed.

For the appellant there was a brief by *Weed & Van Doren,* and oral argument by *F. C. Weed.*

Oliver H. Day, for the respondents.

MARSHALL, J. The facts alleged in the complaint make a good case for the interference of equity jurisdiction. Respondent obtained appellant's land and obligation for $2,500, secured by a mortgage on land conveyed to appellant in exchange therefor, by representing that there was but a small incumbrance upon the latter land which he would promptly pay off. Instead of the incumbrance being small, it was in excess of one fourth of the value of the property. If we concede for the purposes of the case, that appellant was so negligent respecting his interest, in that he omitted to inform himself as to the amount of the incumbrances, that judicial remedies should not be afforded him to redress the wrong complained of so far as produced by the false representations referred to, yet there is the mistake, or something worse, on respondent's part, in that his agent in his presence, while assuring appellant that she would prepare the deed to be executed by respondent in accordance with a form placed before her, which consisted of a deed with full covenants, inserted in the draft in the covenant against incumbrances an exception as to mortgage indebtedness. It is difficult to see why a court of equity should not relieve appellant from the effects that might otherwise flow from that serious departure from the agreement, since without such relief appellant would be left remediless for the wrong. Slight circumstances excusing appellant's failure to examine the deed before accepting it are sufficient to prevent its being held, as a matter of law, that he

was inexcusably negligent in that regard precluding any successful appeal on his part to the courts for redress. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. Such circumstances abundantly appear in the allegations, that appellant intrusted the drawing of the deed to respondent's agent as indicated; that in the face of a full understanding of the matter she failed to draw it in conformity thereto; that respondent obtained possession of the paper so soon after the execution thereof as to leave appellant very little time to discover its infirmity, lulling the latter into a sense of security by offering to act for him in placing the same immediately on record, at the same time assuring him that the incumbrance should be speedily paid off. Respondent suggests that since payment of the mortgage indebtedness was not made a condition precedent to consummating the trade, his promise being taken instead, the delay in redeeming such promise or refusal to do so, was a mere breach of contract, for the redress of which legal remedies are amply sufficient, hence that equity jurisdiction should not lend its aid in the matter. In that counsel fails to give proper effect to the material circumstances, that respondent is insolvent; that the $2,500 mortgage may be by him transferred, and that respondent threatens to do that which, if it were to occur, would render courts of law, and equity as well, incapable of protecting appellant from the consequences of the fraud or mistake. Assuming as we must that all the allegations are true, they exhibit a situation rendering legal remedies entirely inefficient to redress the wrong complained of. To shut the door of equity to appellant would violate the fundamental principle thereof, that equity suffers no wrong rising above mere moral transgressions to go unredressed in face of a seasonable clean-handed application to it for a remedy.

By the Court.—The order sustaining the demurrer is reversed, and the cause remanded for further proceedings according to law.

HOFFMAN, Appellant, vs. PETERSON and another, Respondents.

December 17, 1904—January 10, 1905.

Tax deeds: Redemption by minor after attaining majority: Statutes: Construction: "Other person:" Action to set aside tax deed after redemption: Counterclaim.

1. Under sec. 1165, Stats. 1898 (providing that the owner or occupant of any land sold for taxes or other person may, at any time within three years from the date of the certificate of sale, redeem the same or any part thereof), and sec. 1166 (providing that the lands of minors or any interest they may have in lands sold for taxes may be redeemed at any time before such minors come of age, and during one year thereafter), the right of redemption given to a minor is not impaired by the fact that a tax deed has been issued before the actual redemption.
2. The words "other person" in sec. 1165, Stats. 1898, enable those whose rights would be directly prejudiced by the absolutism of the tax title to redeem therefrom, though they may be neither owners nor occupants.
3. In an action for trespass for wrongfully cutting timber, plaintiff's title was based on a tax deed issued in 1896 on the tax sale of 1893. At those dates the property belonged to a minor who attained his majority April 21, 1901. The minor conveyed the premises by warranty deed to defendants in November, 1901, and redeemed from such tax sale March 8, 1902. *Held*, that the right of redemption existed in such minor when he exercised it.
4. Where lands are vacant and unoccupied it is not necessary for one redeeming, after a tax deed has been recorded, to commence an action to set aside that deed before he can exercise his rights of ownership.
5. In such case, the tax deed, upon the act of redemption within the right preserved by law, becomes wholly void and of no effect.
6. Under sec. 1189, Stats. 1898 (providing that the statutory limitation on bringing any action after three years from the recording of the tax deed, or any other limitation in favor of a tax deed or a tax certificate, except in case of actual possession founded on a tax deed, shall not apply where the taxes, for the nonpayment of which the lands were sold and the tax deed executed, were paid prior to the sale, or where the land was re-

deemed from operation of such sale as provided by law, or where the land was not liable to taxation), there is nothing after redemption, within the rights preserved by law, which precludes the holder of the legal title from regaining actual possession, either by taking it in the case of vacant and unoccupied land, or by bringing action, within the period of the general statutes of limitation, in case the tax-deed claimant is in actual occupancy.

7. Although no action on the part of an owner who has lawfully redeemed from a tax sale is necessary to enforce possession and ownership, the act of the holder of a recorded tax deed in bringing an action of trespass against the owner, basing his right on such tax deed, constitutes such an apparent cloud, and such setting up of a claim to the land, as enables such owner by counterclaim in that action to have the title quieted in him.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action for trespass in wrongfully cutting timber on certain vacant and unoccupied land in Outagamie county. The answer and counterclaim set up, and the court finds, that plaintiff's title is based on a tax deed issued in 1896 upon the sale of 1893 for unpaid taxes of 1892. The property belonged to Adolph Johnson in his lifetime, who died in 1887, leaving Albert Johnson, a minor, his sole heir at law. The latter attained his majority on April 21, 1901, and March 8, 1902, within one year thereafter, paid to the county clerk, as in redemption of said taxes, the proper sum, and received due and formal redemption receipt and certificate. In November, 1901, Albert Johnson conveyed the premises by warranty deed, through and under which the defendants claim title. The court concluded, as matter of law, that the land was duly redeemed from said tax sale; that plaintiff's deed thereby became void; that defendants, at the time of the trespass and at the time of the judgment, were owners in fee simple, and were entitled to judgment dismissing the complaint and canceling plaintiff's tax deed. From judgment in accordance with these conclusions, plaintiff appeals.

For the appellant there was a brief by *McManamy & McManamy,* and oral argument by *F. V. McManamy.*

C. D. Cleveland, Jr., for the respondents.

DODGE, J. Plaintiff denies the right of a minor to redeem from a tax sale after the deed has been issued. Sec. 1165, Stats. 1898, provides:

"The owner or occupant of any land sold for taxes or other person may, at any time within three years from the date of the certificate of sale, redeem the same or any part thereof."

Sec. 1166, Stats. 1898, provides:

"The lands of minors or any interest they may have in lands sold for taxes may be redeemed at any time before such minors come of age and during one year thereafter."

It is difficult to discover in these statutes any such limitation as that for which appellant contends. It is lands "sold for taxes" which may be redeemed, and it would constitute legislation, rather than construction, to insert into these express and unambiguous statutes a condition that the redemption take place before the issue of the deed, and would, in our opinion, in large measure, thwart the beneficent purpose of sec. 1166, to preserve to minors their lands during their nonage against the drastic forfeiture imposed by our laws for the collection of taxes upon real estate. That no such limitation was, indeed, contemplated by the legislature, is evinced by sec. 1176, which, in defining the character of title conferred by a tax deed, recognizes that in some cases a right of redemption persists beyond its issue and delivery. The right of redemption after the issue of a deed by a minor or other person has apparently never been questioned before this court. The cases cited by the appellant declaring the impregnable character of a tax deed after three years from its record were all decided with reference to fee owners of full age, to whom a right of redemption is given by the statutes only prior to the issue and record of the deed. On the other

hand, in numerous cases, the fact that the tax certificate had ripened into a tax deed was assumed to be no obstacle to redemption, although, no question being raised, there was no discussion of the subject. *Jones v. Collins,* 16 Wis. 595; *Wright v. Wing,* 18 Wis. 45; *Eaton v. Tallmadge,* 24 Wis. 217, 222; *Dayton v. Relf,* 34 Wis. 86; *Tucker v. Whittlesey,* 74 Wis. 74, 84, 41 N. W. 535, 42 N. W. 101; *Little v. Edwards,* 84 Wis. 649, 55 N. W. 43. We therefore conclude that the right of redemption given to a minor by sec. 1166 is not impaired by the fact that a deed has been issued.

The next question in order is whether the minor in this case had any such interest, after executing and delivering his warranty deed, as would entitle him to redeem. The statutes above mentioned give this right of redemption not only to the owner and occupant, but "other person." In this respect they are broader in terms than those of many other states. Nevertheless it has been held that a mere stranger has no right of redemption, and therefore an attempt on his part to exercise it by paying money to the county clerk is futile. *Cousins v. Allen,* 28 Wis. 232; *Rutledge v. Price Co.* 66 Wis. 35, 27 N. W. 819. The right of redemption, especially in minors, is highly favored, and statutes conferring it have always been accorded liberal construction. *Jones v. Collins,* 16 Wis. 594; *Dubois v. Hepburn,* 10 Pet. 1. Hence we have no doubt that the words "or others," in sec. 1165, are to be given such construction as will enable those whose rights would be directly prejudiced by the absolutism of the tax title to redeem therefrom, though they be neither owners nor occupants. The right has been recognized in favor of those having mere moral beneficial interest under void parol trust (*Karr v. Washburn,* 56 Wis. 303, 14 N. W. 189; *Begole v. Hazzard,* 81 Wis. 274, 51 N. W. 325); an administrator, though without title, and without any showing that the land was necessary for debts (*Bowers v. Williams,* 34 Miss. 324); or a wife having mere inchoate homestead interest (*Lamar v.*

Sheppard, 80 Ga. 25, 5 S. E. 247). Just what interest or title to the land rests in one specially privileged to redeem after issue of tax deed is thrown in some measure of doubt by remarks made *arguendo* in *Wright v. Wing, supra,* and *Little v. Edwards, supra.* In the former it is said such person has no present interest in the land; the title being vested in the grantee of the tax deed, subject to right of redemption, a mere privilege. In the latter, referring to a situation under the absolute five-year period of redemption then existing in favor of "widowed women" (ch. 89, Laws of 1868), it was intimated that a tax deed during the five years gave the grantee no greater rights of possession than would a tax certificate. The former view certainly seems more consonant with sec. 1176, which, in terms, at least, so declares. It is not, however, very material to the present consideration whether merely a privilege, or both a privilege and a title, persists in a minor after issue of tax deed to his lands. The privilege certainly does persist, and, beyond any question, is a personal privilege, which cannot be conveyed to another, and upon which no attempted conveyance of the land can have any effect. We are persuaded that the true policy of our statutes is that this privilege shall be enjoyed by the minor throughout the full statutory term, if the minor's interests may be subserved or protected thereby, though it may not be exercised if of no possible benefit to the minor. *Cousins v. Allen, supra.* In the present case, by warranting title to his grantees, Albert Johnson continued to have the same interest in the redemption of the land as if he had made no deed at all. If denied that right, his pecuniary loss is the value of the land, as measured, at least, by the price for which he was able to sell it. In this situation, we are convinced that right of redemption existed in him in March, 1902, when he exercised it.

The further question is raised by the appellant—whether it is not necessary for one redeeming after a tax deed has been recorded to commence some action to set aside that deed be-

fore he can treat the land as his own. Whatever necessity there may be in case the grantee in the tax deed be actually in possession of the real estate is immaterial here, for the land is vacant and unoccupied, and no action could be brought, based upon plaintiff's possession, except upon the theory of constructive possession resulting from the record of his tax deed. This deed, upon the act of redemption within the right preserved by law, became wholly void and of no effect. *Wright v. Wing,* 18 Wis. 45; *Little v. Edwards,* 84 Wis. 649, 55 N. W. 43; Blackwell, Tax Tit. § 701. It no longer had the force accorded such deeds by sec. 1176, but was entirely deprived of effect, except as it constituted a cloud upon the defendants' record title as that appeared in the registry of deeds, requiring reference to the records of the county clerk or treasurer to disclose the invalidity of the deed. There being no actual possession, there was nothing to preclude the true owner from entering upon the premises, occupying them, or exercising other acts of possession or ownership over them. Hence no action needed to be brought as a preliminary to the exercise of such rights, and this action for trespass against the parties holding such real title must fail.

The statute of limitations denying any action after three years from the recording of the tax deed, as, indeed, all other special statutes of limitation, is wholly without application after redemption, by virtue of sec. 1189, which provides:

"Nor shall such limitation nor any other limitation in favor of a tax deed or a tax certificate, except in case of actual possession founded on a tax deed, apply where the taxes, for the non-payment of which the lands were sold and the tax deed executed, were paid prior to the sale, or where the land was redeemed from the operation of such sale as provided by law or where the land was not liable to taxation."

Hence there was nothing in the lapse of a year or two after the redemption which could preclude the holder of the legal title from regaining actual possession, either by taking it in

the case of vacant and unoccupied land, or by bringing action in case the tax-deed claimant were in actual occupancy.

Notwithstanding that no action was necessary to enforce possession and ownership of the premises, however, both the existence of the tax deed on the record, and the act of plaintiff in bringing this action, constituted such an apparent cloud and such a setting up of a claim to the land as would enable the defendants to maintain an action under sec. 3186 to quiet their title; and such action, is, in substance, brought by the counterclaim in defendants' answer praying judgment canceling the tax deed.

From the views thus expressed, we must conclude that the land in question was lawfully redeemed from plaintiff's tax claims upon it in March, 1902; that thereafter he had no rights whatever therein to sustain his action of trespass, but that his tax deed, and declared claim thereunder, entitle defendants to have the same adjudged invalid.

By the Court.—Judgment affirmed.

COMMERCIAL HOTEL COMPANY, Appellant, vs. BRILL and another, Respondents.

December 17, 1904—January 10, 1905.

Landlord and tenant: Lease under seal: Surrender: Corporations: Officers: Authority.

1. Where the lessee under a lease under seal actually delivered possession of the premises to the landlord by turning them over at his request and direction to parties who had leased them from the landlord, such circumstances are sufficient in law to constitute a surrender, although not in writing as required by the statute.
2. The secretary and treasurer of plaintiff corporation signed a lease with defendant, was charged with the duty of putting de-

fendant into possession, and collected and received the rent from him. He also secured the assignment of defendant's lease to third persons, all the negotiations by the third parties to secure a lease of the premises being conducted with him. His authority to act in all these matters was conceded up to the point of effectuating a surrender of defendant's lease. *Held*, that the extent of his authority as evidenced by these acts, carried with it authority to effect a surrender of such lease as an act reasonably within the scope of his employment in conducting and managing plaintiff's business.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Plaintiff, a corporation, brings this action to recover the sum of $470, rent due under a lease, and the sum of $425 for waste and injury to the premises held by the defendant *Brill*, as lessee. About November 1, 1897, the plaintiff and the defendant *Brill* entered into a leasing contract, whereby plaintiff, as owner, leased to defendant *Brill* the hotel property described in the lease, situated in the city of Appleton, Wisconsin, for the term of five years from the 1st day of January, 1898, at an annual rental of $1,200, payable in monthly instalments of $100 in advance. It was agreed that the lessee was to keep the interior of the hotel building in repair and in tenantable condition. There was also an agreement against subletting. The defendant *Henry Ashauer* and one George Walter became sureties for the payment of the rent and the faithful performance of the conditions of the lease on the part of the lessee. The defendant *Brill* went into possession of the premises as lessee on the 1st day of January, 1898. He continued in actual possession until December 9, 1899. It appears that at some time prior to December 9, 1899, the defendant *Brill* had interviews with F. B. Voight, the secretary and treasurer of the plaintiff corporation, concerning his (*Brill's*) discontinuance of the hotel business on these premises, and the substitution of some other person in his place as lessee. Plaintiff's testimony, including that of F. B. Voight,

is to the effect that the defendant *Brill* made a sale of his interest in this lease, and also his personal property in the hotel, to Peter Renn and August Ashauer, of the city of Appleton, on December 9, 1899, and assigned to them his interest in the lease for the remainder of the term, and that they went into possession of the hotel premises as subtenants of *Brill*. The defense to this claim is that Renn and Ashauer were the tenants of the plaintiff under an agreement made with F. B. Voight, its secretary, and that *Brill* surrendered his lease to plaintiff under an agreement with Voight, and as a part of such surrender the lease was assigned to Renn and Ashauer at Voight's direction, and that they took possession of the premises under this lease as the tenants of the plaintiff. The evidence is in conflict as to each of these claims. The court found that the plaintiff, through its secretary and agent, F. B. Voight, made an agreement with Renn and Ashauer, whereby plaintiff contracted to give them possession of the hotel property as its tenants, under purchase of the *Brill* lease, for the remainder of the term of such lease, upon the same terms and conditions; and that *Brill*, under agreement with Voight, its officer and agent, surrendered possession of the premises to plaintiff by assigning his lease to Renn and Ashauer, at Voight's request and direction, and that thereupon Renn and Ashauer went into possession of the premises under plaintiff, and held them as its tenants. The court also found that this agreement so made by Voight with *Brill* was within the scope of his authority as secretary and agent of the plaintiff in dealing with and managing this hotel property. There is no dispute as to the assignment of the lease by *Brill* to Renn and Ashauer at the time specified; that they went into possession and occupied the hotel thereafter for the unexpired period covered by the lease; that they paid the rent as stipulated, except the amount sued for; and that *Brill* paid all the rent up to the time Renn and Ashauer took possession of the premises. The testimony of *Brill* is that he had an understanding that

if another tenant acceptable to Voight could be found he would surrender the lease and premises to plaintiff, and thereafter be released from all liability on the contract; that Voight thereafter made an agreement with Renn and Ashauer to the effect that they were to take the hotel property, as plaintiff's tenants, under an assignment of defendant's lease for the unexpired term, and upon the same conditions; that he (*Brill*), at Voight's request, on December 9, 1899, and in Voight's presence, assigned the lease to Renn and Ashauer, and surrendered the keys and possession to them at Voight's direction; that he thereupon paid Voight all rent due from him; and that all subsequent dealings in respect to the premises, including the payment of rent and the final surrender of the premises, were between Voight and Renn and Ashauer. This testimony was corroborated in part by the testimony of Renn and that of Ashauer. The testimony of Voight and other witnesses was in conflict therewith. Upon the findings by the court, judgment dismissing the complaint and for costs was entered, and from this judgment plaintiff appeals.

For the appellant there was a brief by *G. T. Moeskes* and *John Bottensek,* and oral argument by *Mr. Bottensek.*

For the respondents there was a brief by *Pierce & Lehr,* and oral argument by *Humphrey Pierce.*

SIEBECKER, J. Appellant contends that the court erred in its finding that there was a surrender of the hotel premises by the defendant *Brill,* as lessee, on December 9, 1899, when Renn and Ashauer took possession. It is not claimed that there was a surrender in writing as required by the statute, but it is claimed that there was a surrender by operation of law, in that the lessee (*Brill*) actually surrendered possession of the premises to plaintiff by turning them over at the request and direction of plaintiff's secretary and agent to Renn and Ashauer, who had leased them from plaintiff. Such circumstances are sufficient in law to constitute a surrender of

a lease under seal. As stated in *Witman v. Watry,* 31 Wis. 638:

"Where, before the expiration of a lease under seal, the lessee actually surrendered possession of the premises to his lessor, who accepted the same and leased them to another, it was held to be, in effect, a surrender." 1 Washburn, Real Property, § 739. See, also, *Kneeland v. Schmidt,* 78 Wis. 345, 47 N. W. 438; *Goldsmith v. Darling,* 92 Wis. 363, 66 N. W. 397.

The court found that the evidence established an actual surrender of the premises by the lessee to plaintiff when he assigned his lease and delivered possession of the premises to Renn and Ashauer, who had leased them from plaintiff by an agreement with Voight, plaintiff's secretary and agent, for the unexpired term of the lease. The evidence upon this issue was in conflict. We cannot say that the finding excepted to is against the clear preponderance of the evidence. As set out in the foregoing statement of facts, the testimony of *Brill* clearly tends to show that there was an actual surrender of the premises to the lessor by an assignment of the lease and delivery of the keys to Renn and Ashauer at its agent's request, and that they took possession of the premises as tenants of the plaintiff. The evidence of Renn and Ashauer corroborates this claim. We must hold that there is proof to support this finding.

It is further claimed that there is no proof sustaining the finding that Voight had authority to act for plaintiff in effecting a surrender of the lease. It appears that he is the secretary and treasurer of the plaintiff, and as such signed the lease to the defendant *Brill;* that he was charged with the duty of giving possession of the premises to *Mr. Brill,* and of attending to the making of repairs; that he collected and received the rent from the defendant, and that all negotiations by Renn and Ashauer to secure the lease of the premises were conducted with him, and that he secured the assignment of the lease. His authority to act in all these matters seems to be

conceded up to the point of effecting a surrender. The extent of his authority, as evidenced by all these acts, must be held to carry with it authority to effect a surrender of the lease as an act reasonably within the scope of his employment in conducting and managing plaintiff's business. Mechem, Agency, §§ 278, 279, and 287.

By the Court.—Judgment affirmed.

ZIMMER, Appellant, vs. FOX RIVER VALLEY ELECTRIC RAILWAY COMPANY, Respondent.

December 17, 1904—January 10, 1905.

Street railways: Injuries to passengers: Negligence: Second trial: Law of the case: Evidence: Experiments.

1. Where on a second trial after reversal on appeal, the evidence produced on the issue of defendant's negligence was substantially the same as on the first trial, except that defendant produced more evidence tending to refute its negligence, such evidence not being of the class, such as some indisputable physical fact, which of itself rendered the evidence tending to show negligence necessarily incredible, the question upon the issue of actionable negligence is foreclosed by the former decision.
2. Testimony of experiments is competent if the conditions be sufficiently similar, so that the facts attending the experiment will fairly illustrate the point in issue.
3. When evidence of experiments is offered, it devolves upon the court, before receiving it, to determine, upon a proper showing, whether the conditions existing on the two occasions are *prima facie* essentially the same.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This case was before this court on a former appeal, which is reported in 118 Wis. 614, 95 N. W. 957. The action is brought to recover damages for a personal injury which

plaintiff claims to have sustained through defendant's negligence. It appears that plaintiff at the time in question was riding on one of defendant's street cars in the city of Menasha, and that he fell off the car while it was passing around a curve in the tracks, receiving some injuries. At the conclusion of the testimony, defendant requested the court to direct a verdict in its favor upon the ground that no actionable negligence had been shown against the defendant, and upon the ground that plaintiff had been guilty of negligence contributing to produce the injury complained of. The court directed such a verdict, and awarded judgment of dismissal. This ruling is alleged as error, and this is an appeal from the judgment dismissing the cause.

For the appellant there was a brief by *Eaton & Eaton,* and oral argument by *L. H. Eaton.*

J. C. Kerwin, for the respondent.

SIEBECKER, J. The direction of a verdict in defendant's favor is assigned as error upon the ground that the evidence tending to show actionable negligence by defendant was fully as strong upon this trial as upon the former. On the former, the trial court refused defendant's request to take the case from the jury for want of any evidence tending to show the negligence charged, which ruling, upon an appeal to this court, was affirmed. Defendant then insisted that there was not sufficient evidence to sustain a finding of negligence, and that plaintiff was guilty of contributory negligence. This court, in reviewing the evidence, found:

Plaintiff had testified "to the effect that when he got onto the car it was full; that he at first stood on the lower step and then on the upper step or platform, and held himself to the iron railing—the brass railing . . . on the back end, at the window, close to the door; that the car was overcrowded; that, when the conductor came around and collected fare, he put his hand in his side pocket and took out the money to pay his fare; that when he got at the curve the twist and fast driving around the curve threw him off and injured him.

. . . Other witnesses testified . . . to the effect that the plaintiff fell off the rear platform, head first, just as the car got past the curve, and the car was running perhaps five miles an hour, and as it came to this curve it gave a twist and threw him off; . . . that the car was overloaded; . . . that the car went onto the curve just as it came down the main track; that the curve was sharp, and the car naturally gave a twist. Another witness testified . . . that as the car struck the curve it gave a very sudden lurch, and turned very sharply; the back end of the car came in view very suddenly; that the car came about the usual speed for it on Main street; that he did not notice any slackage at all; that it seemed to run unusually quick."

After other testimony of like import had been adverted to, the court observed:

"Viewing such testimony in the most favorable light it will legitimately bear, we are unable to say, as a matter of law, that the finding of the jury that the injury to the plaintiff was caused by the negligence of the defendant is not sustained by the evidence."

An examination of plaintiff's evidence now before us confirms appellant's contention that the evidence adduced upon this trial is substantially the same upon this question, and tends fully as strongly to show negligence as that at the former trial. It is true, defendant has produced more evidence tending to refute it; but in its effect it cannot be said to render the affirmative evidence of negligence incredible, for it is not of the class of evidence, such as some indisputable physical fact, which of itself renders the evidence tending to show negligence necessarily incredible. The additional evidence served but to emphasize the conflicting statements of witnesses, which should be resolved by the jury in passing upon the issues, and in determining the credibility of the witnesses and the weight of the evidence. Under this state of the evidence, the question whether the case should have been submitted to the jury upon the issue of actionable negligence was foreclosed by the former decision, and the ruling for a direction of the verdict was error. *Klatt v. N. C. Foster L. Co.*

97 Wis. 641, 73 N. W. 563; *Darcey v. Farmers' L. Co.* 98 Wis. 573, 74 N. W. 337; *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087.

It is argued that plaintiff, under the undisputed facts, must be held to have assumed the risk incident to his undertaking to ride on the car as he did. It seems the considerations submitted on this point go to the question of plaintiff's negligence, as contributing to produce the injury. This question was also presented on the same state of the evidence on the former trial and appeal, and the court held that the question was one properly requiring submission to the jury.

An exception to the reception of evidence of an experiment made by defendant is urged upon our attention. It appears that defendant's employees made a test by passing over the track with the same car, with persons riding on the rear platform, running the car at the same speed it had attained before reaching the curve; but only seven persons were riding in the car and on the platform, instead of a car filled with passengers, with all the available platform space occupied, as claimed on the occasion of the accident. Testimony of experiments has been held competent if made under essentially the same conditions as attended the subject of inquiry. These conditions must be sufficiently similar, so that the facts attending the experiment will fairly illustrate the point in issue. When such evidence is offered, it devolves upon the court, before receiving it, to determine, upon a proper showing, whether the conditions existing on the two occasions are *prima facie* essentially the same. *Emery v. State,* 101 Wis. 627, 78 N. W. 145; 1 Greenleaf, Ev. 83 (16th ed.); Jones, Ev. § 413; *Burg v. C., R. I. & P. R. Co.* 90 Iowa, 106, 57 N. W. 680.

By the Court.—Judgment reversed, and the cause is remanded for a new trial.

KERWIN, J., took no part.

PIETSCH and others, Respondents, vs. MILBRATH and others, Appellants.

October 24, 1904—January 31, 1905.

Corporations: Corporate stock: Fraud: Res adjudicata: *Pleading: Sufficiency of complaint: Findings: Judgments: Cause of action: Liability of promoters: Limitation of actions: Remedies: Costs.*

1. Where on two former occasions the supreme court has held the circumstances alleged in a complaint constitute a good cause of action in favor of a corporation against the defendants, enforcible at the suit of plaintiffs as stockholders, to recover of the defendants the profits obtained in buying land at one price and selling it to the corporation at another, the sufficiency of the complaint to support a judgment is *res adjudicata.*
2. In such case, it appeared, among other things, from the language of the complaint and the language of the findings, supported by the evidence, that those against whom a judgment was rendered were parties to a plan to obtain control of certain real estate with a view of turning the same over to a corporation, to be formed, at a large profit to themselves without the stockholders therein, other than themselves, having knowledge of their obtaining such advantage; that the plan was executed by the forming of the defendant corporation and the conveyance of the land to it for about twice the sum the promoters paid for the same; that the promoters subscribed for nearly three fourths of the capital stock, ostensibly for cash to the corporation, but without such contribution made in fact; that the promoters sold the remaining stock for cash, the purchasers understanding that a like payment had been, or was to be, contributed to the corporate treasury for each share of the corporate stock; that these transactions took place at a time when only members of the combine interested in making such profits were members of the corporation, and that the plaintiffs furnished substantially all the capital of the corporation. *Held,* that such facts supported the judgment.
3. Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. They may retain their fiduciary relation thereto until its share of the capital shall have been taken and the corporation provided with a board of directors, or some reasonably efficient means of protecting itself.

4. If one or more persons acquire property, intending to promote the organization of a corporation to purchase it from them at a profit to themselves and effect such purpose, limiting the membership to interested parties until the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders, they being kept in ignorance of the true nature of the transaction, and effecting such intent, the promoters are guilty of actionable fraud on the corporation and responsible to it for the gains made.
5. In such circumstances, in the making of the contract between the corporation and its agents, it is mere fiction as to its prospective members by original subscription.
6. In such case, since the corporation has no one to stand for it as an adverse party in the transaction, no meeting of adverse minds, essential to a binding contract, occurs.
7. In such case, the corporation is deceived, in that advantage is taken of its incapacity to protect itself, as to the interests of prospective memberships by the original taking of its stock.
8. Where promoters were concerned in a transaction of buying land at one price to turn it over to a corporation to be formed at a much greater price, and to induce others to come into the corporation in ignorance of the facts, such others contributing the actual capital necessary to fully accomplish the purpose of the promoters, the corporation, both before and after the adoption of the Code, had a remedy at law to enforce the liability of the promoters to refund to the corporation their profits.
9. In such case, when it appeared that the cause of action accrued more than six and less than ten years before the action was commenced, the cause of action of the corporation is extinguished, as is also that of the stockholders to enforce such cause of action.
10. Except in an action for relief on the ground of fraud in a case which was, on and before February 28, 1857, cognizable solely by a court of chancery (subd. 7, sec. 4222, Stats. 1898), the running of the statute of limitations is not postponed until the discovery, by the aggrieved party, of the facts constituting the fraud.
11. The maxim that there is no wrong without a remedy, does not apply to a wrong, so called, which is not a wrong at all, because the written law makes it otherwise.
12. The fact that the plaintiff has prosecuted his case in good faith, is no good reason for making an exception to the general practice of awarding costs to the defendant, where in equity the defendant prevails as to the entire cause of action set forth in the complaint.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action by stockholders of a corporation to enforce an alleged promoter's liability. The complaint was held sufficient in that regard upon two previous appeals. *Pietsch v. Krause,* 112 Wis. 418, 88 N. W. 223, and 116 Wis. 344, 93 N. W. 9. In the report of the first appeal a full statement thereof will be found.

The issues raised by the pleadings were decided substantially to this effect: Plaintiffs are members of defendant corporation, becoming such by taking stock therein on or about the time of its organization or purchasing stock thereafter. They commenced this action for its benefit. July 15, 1892, one *Thomas* and one Textor,—the latter being now deceased and represented in this action by *Clinton Textor,* administrator of his estate,—planned to obtain control of two certain farms, to cause a corporation to be organized to purchase the same from them at a price yielding them a large profit without the knowledge of such persons as they might induce to take stock in such corporation. July 15, 1892, pursuant thereto they secured the right to purchase one of said farms for $17,300, paying down a trifling sum, a few days thereafter assigning a quarter interest therein to defendants, *Mueller, Okershauser* and *Thomas,* who at that time were parties to the venture. July 21st thereafter *Thomas,* in further execution of such plan, secured the right to purchase the other farm for $46,584, paying down $1,000, and on the same day assigning a one-fourth interest in such right for a nominal consideration to his associates. August 10th, defendant *Charles W. Milbrath* on behalf of himself and defendants *Lindenmann, Kretschmar* and *Hanson* paid $2,000 on one of the purchase contracts, taking in consideration thereof *Thomas'* interest therein. Part, if not all, defendants prior to August 26, 1892, agreed upon the details of the corporation to be organized, the same being that the capital stock should

be 2,034 shares, of the par value of $203,400; that the members of the combine should have 1,472 shares, ostensibly for $34 per share cash, but really without consideration; that 562 shares should be sold to outside parties for $34 cash per share; that the 1,472 shares should be distributed in proportions specified, to the members of the combine, and that all money contributed by them should be returned out of that paid in by outsiders. August 26th thereafter Textor contracted to sell to one *Bird* ten shares of the prospective stock for $340. September 22d thereafter defendant *Krause* succeeded to the interest of Ramsey, refunding to the latter the amount of his investment. September 22, 1892, the articles of organization of the contemplated corporation were duly filed, the incorporators being said *Kretschmar, Milbrath, Lindemann,* Textor and *Hanson.* September 23d, in advance of action by such corporation in respect to the matter, *Milbrath, Kretschmar, Lindemann,* Textor and *Thomas* caused the title to the land by two deeds to be vested in Textor, the stated consideration in each deed being "$1, and other good and valuable considerations." Said Textor thereupon conveyed the land to the corporation at a stated consideration of $116,000. The deeds were duly recorded. When the title was so vested in Textor, mortgages were given back for $46,238. When he deeded to the corporation, it, in form, assumed and agreed to pay the mortgage indebtedness. The difference between such mortgage indebtedness and the cost of the land to the promoters was paid by them and they were thereafter reimbursed, in the main, pursuant to the aforesaid plan, out of $6,630, paid for stock to the corporation by plaintiffs. To aid in executing such plan a subscription paper was prepared,—in form, obligating the signers to take the number of shares in the corporation to be formed set opposite their respective names at $34 cash per share. The amount of the proposed capital stock and the purpose of the corporation were stated in such paper, in harmony with the foregoing. The

promoters in the main, in order to disguise the real transaction signed the paper. Names of some of the plaintiffs were signed thereon, but whether by them or by their authority, does not clearly appear. At a meeting of subscribers to stock held October 4, 1892, no one being present but participants in the aforesaid profits, a board of directors was elected from their number. No record of the meeting was made for several months thereafter. October 6, 1892, a meeting of such board was held, no one being present but the said interested parties, when that which had theretofore been done as to acquiring the land was approved, and 562 shares of stock unsubscribed for was ordered set apart, to be known as "treasury stock" and sold at $34 cash per share, $2 per share to be allowed as a commission to persons placing the same. The result was that $1,050 was paid out of the corporate treasury as commissions. Many of the plaintiffs became purchasers of the so-called "treasury stock" and others bought stock that had theretofore been taken by some of the defendants, the former supposing themselves to be original takers thereof. In all cases they took the stock upon the faith of representations made to them that defendants had paid, or were to pay, the full sum of $116,000 for the land, and that all stock was taken on the basis of yielding $34 per share cash to the corporation. The total of 1,472 shares planned to be taken by the promoters, as aforesaid, was issued to them, but no stock was issued to any one prior to October 18, 1892. Each year, for several years after the organization of the corporation, for the purpose of keeping plaintiffs in ignorance of the facts aforesaid, misleading reports were sent to them by its officers as to its condition. They did not learn of facts rendering defendants liable for the profits made by them as aforesaid until a few months prior to the commencement of this action. The fair market value of the land sold to the corporation, at the time of the conveyance thereof, was $250 per acre. Further facts were found exonerating defendant Ramsey.

Upon such facts the court held, in effect, that the corporation was defrauded out of $34 per share on 1,472 shares of stock issued to the promoters, amounting to $50,048, and that defendants, except Ramsey, were liable therefor with interest. Judgment was accordingly ordered and rendered, requiring them to pay such sum and interest into court, or to the treasurer of the corporation upon a contingency named, for the benefit of the corporation, and judgment was also ordered and rendered against defendants, except Ramsey, for costs.

For the appellant *Krause* there was a brief by *Quarles, Spence & Quarles,* and oral argument by *T. W. Spence.*

For the other appellants there was a brief by *Julius E. Roehr,* attorney, and *Timlin & Glicksman,* of counsel, and a reply brief signed by *Timlin & Glicksman,* of counsel, and oral argument by *Mr. W. H. Timlin* and *Mr. Roehr.*

For the respondents there was a brief by *Geo. L. Williams* and *Bohmrich & Williams,* and oral argument by *Geo. L. Williams.*

The following opinion was filed November 15, 1904:

MARSHALL, J. As indicated in the statement, this court has twice held in this case that by rules in previous decisions made here the circumstances alleged to have occurred constitute a good cause of action in favor of the corporation against the defendants, enforcible at the suit of the plaintiffs as stockholders, to recover of the former the profits obtained in buying the land at one price and selling it to the corporation at another. The cases where the controlling principles have been proclaimed and applied are numerous, the most significant being *Pittsburg M. Co. v. Spooner,* 74 Wis. 307, 42 N. W. 259; *Fountain S. P. Co. v. Roberts,* 92 Wis. 345, 66 N. W. 399; *Franey v. Warner,* 96 Wis. 222; *Hebgen v. Koeffler,* 97 Wis. 313, 72 N. W. 745; *Milwaukee C. S. Co. v. Dexter,* 99 Wis. 214, 74 N. W. 967; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Spaulding v. North*

Milwaukee T. S. Co. 106 Wis. 481, 81 N. W. 1064; *Forest Land Co. v. Bjorkquist,* 110 Wis. 547, 86 N. W. 183. It follows that the sufficiency of the complaint to support a judgment is *res judicata. Case v. Hoffman,* 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

While, as counsel for appellants claim, the findings are indefinite, being so framed at some points that they might be taken one way or another, they follow the complaint in that regard. Why this indefiniteness, we need not go far to discover. A misunderstanding by counsel of language used in *Spaulding v. North Milwaukee T. S. Co. supra,* or inability of counsel to satisfactorily gather the purport thereof is very plainly portrayed in both complaint and findings. It is probable the learned trial court allowed counsel to phrase the decision as it appears in the records, and if it were not for that which, though sanctioned by practice, in the judgment of the writer, cannot be too strongly condemned,—if the court had responded fully to the commands of the statute to state in writing its decision, instead of permitting the stating thereof to be done by one viewing the case from a one-sided standpoint,—the uncertainty complained of would not exist, and we would not have before us a decision as to facts, under any circumstances requiring careful consideration to determine its meaning in advance of pronouncing the legal effect thereof.

It is of course conceded that if the findings will reasonably admit of a construction harmonizing with and responding to the allegations of the complaint, as it was viewed here on the former occasion, on their face they will support the judgment. The view that we take of this case renders unnecessary any examination in detail of the numerous criticisms of the findings made by appellants' counsel, or deficiencies therein suggested.

It must be conceded that the following situation is well within the language of the complaint and the language of the findings, as well as supported by the evidence: Those against

whom the judgment was rendered were parties to a plan to obtain control of certain real estate with a view of turning the same over to a corporation to be formed, at a large profit to themselves without the stockholders therein, other than themselves, having knowledge of their obtaining such advantage. The plan was executed by the formation of defendant corporation and conveyances of land to it for $116,000, when the expenditure to acquire such land was about one-half thereof, and taking 1,472 shares of the capital stock of the corporation, of the par value of $147,200, ostensibly at $34 per share, to be contributed in cash to the corporation, without such contribution being made in fact; the setting aside of 562 shares of stock to be sold by the corporation to outsiders at $34 per share cash, through the efforts of members of the combine, the purchasers understanding that a like sum had been, or was to be, contributed to the corporate treasury for each share of the corporate stock; the doing of all those things at a time when only members of the combine interested in making the profits aforesaid were members of the corporation; the completion of the plan thereafter by the sale of the 562 shares of stock at $34 per share, the plaintiffs being the victims and furnishing substantially all of the capital of the corporation. The legal effect of such facts, as we shall see, is sufficient to support the judgment, unless defendants are entitled to recover on their plea of the statute of limitations.

True, the complaint is so framed as to suggest that some, at least, of the plaintiffs were stockholders at the time the corporation was organized and the land conveyed to it, and were not then deceived as to the real nature of the transaction, true, the findings are so drawn as to suggest the same thing, and true, the evidence shows clearly that none of the plaintiffs were members of the corporation when the transaction occurred between it and the promoters whereby they obtained, substantially without consideration, 1,472 shares of its stock; that when the corporate proceedings were had respecting the

land every one then a member of the corporation was fully advised as to the nature thereof; that the only deception practiced on defendants was by inducing them to take the stock of the corporation at $34 cash per share, believing all the subscribers or takers of stock were to contribute likewise therefor; and if it be the law that if no one was literally, at the time the transaction between the promoters and the corporation occurred, deceived, then no complaint can be made by or in the name of the corporation against the defendants, no cause of action was established by the evidence unless that question is foreclosed by the decision made when the complaint was challenged on demurrer.

Counsel for appellants contend that the contingency above suggested as to the law is ruled in their favor by *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481, 81 N. W. 1604;—that every member of the corporation, as matters stood when the land was transferred to it and the promoters came into possession of the profits sought to be regained, was fully advised in respect thereto; that no one was then deceived, so the prime essential of a cause of action in favor of the corporation is wanting; that if, after the consummation of the deal between the promoters and the corporation, deception was practiced by any defendant, inducing any plaintiff to take stock, supposing he was obtaining it on the same terms as the promoters, it is personal to himself. Those views are based on this language used in that case:

"The liability of promoters of a corporation is predicated on fraud, the essential element of which is deceit. It does not matter that the corporation received property at a higher price than it cost the promoter, to give the corporation a right to rescind or recover back profits made. It must have been deceived into paying such price or the corporation cannot be deceived, save as some of the individuals composing it are."

No serious fault can be found with that. Generally speaking, it is correct. It was used as regards a situation where all the stock of a corporation had been taken. Certainly the

court did not intend to hold that a corporation has not capacity to acquire a cause of action to recover profits made by its agents, acting in the double role of such agents and at the same time for themselves and to their own advantage, no one standing by to protect it; that they can perfect the corporate organization, keep control thereof for their own gain while ostensibly promoting its interests; that they can restrict subscriptions to stock to a part taken by themselves in order that their ulterior purpose may be accomplished; that while so in control for such purpose, ostensibly acting for the corporation but really for themselves, they may make the organization a mere secret conduit through which to convert the money paid by future subscribers to stock to their own gain and then use the corporate organization to aid in luring such subscribers into the trap, the corporation being powerless to prevent it—and yet the law furnish it no remedy for the wrong. To establish such a doctrine would be to open a most inviting avenue for the commission of fraud. Then the well-settled doctrine that promoters cannot secretly obtain profits from the corporation they cause to be organized and launched into the business world without being responsible to it therefor can be easily evaded by their organizing the corporation, taking part of the stock ostensibly at the full par value thereof in cash, but really paying little or nothing therefor, and then inducing others to take the balance of the stock in ignorance of the facts, paying the full par value therefor into the corporate treasury.

The law does not permit any such transaction as the one above suggested to go necessarily unredressed. Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. They may retain their fiduciary relation thereto till its share capital shall have been taken and the corporation provided with a board, or some reasonably efficient means of protecting its interests. So long as there are prospective original sub-

scribers for stock and the promoters and those concerting with them remain in control of the corporation, it is in a situation to be deceived, within the rule of the *Spaulding Case*. It is deceived in a legal sense when it is rendered helpless by its managers as to protecting those invited to subscribe for its stock, and is then used to aid in defrauding them. It is deceived thereby just as effectually as regards necessity for, and means of, redress as in a case where promoters by control of a corporation cause it to deal with them to their special advantage over then existing and unsuspecting members thereof.

The foregoing will be found well supported in authorities. If a corporation has been organized and persons promoting it up to that time continue to act for it by inducing persons to come in and subscribe for its capital stock, their relations as promoters continue. Alger, Law of Promoters, § 20. In the leading English case of *Erlanger v. New Sombrero P. Co.* L. R. 3 App. Cas. 1236, Lord CAIRNS said in substance:—

> Promoters have in their hands the creation and molding of the company; they have power to define how and when and in what shape and under what supervision it shall start into existence and begin business. If they are doing all this in order that the company may at the outset become, through its managing directors, a purchaser of property from themselves it is incumbent upon them to provide it with a board of directors, who will meet them at arm's length in arranging the business transaction.

The circumstances in that case were quite similar to those in this one. There was an attempt to bind the corporation by a contract purporting to have been made between the vendor and directors before the shares were offered for subscription, whereas the directors were only the associates of the vendor, who exercised no judgment of their own in behalf of the corporation.

The rule stated by Lord CAIRNS is said not to apply when the promoters are subscribers of all of the capital stock (*Salo-*

mon v. Salomon & Co. 75 L. T. Rep. 437), or all the stock has been taken and the holders thereof assent to the transaction (*Parsons v. Hayes,* 14 Abb. N. C. 419). Then if a person acquiring stock otherwise than at first hands, is deceived into doing so by fraudulent representations that the full amount of the share capital has been paid into the corporation and that all the stock was taken on a common basis, his right of action for damages is personal, not for enforcement of the rights of the corporation. Morawetz, Corp. § 290. In harmony therewith is *Stewart v. St. L., Ft. S. & W. R. Co.* 41 Fed. 736, where it was held in effect that Lord CAIRNS' rule did not apply because at the time of the occurrence complained of the owners of all outstanding stock consented, the transaction was fully exposed on the corporation records, and it was not then intended to solicit further subscriptions to stock. There are other circumstances where Lord CAIRNS' rule has been said not to apply, but in no case has it been rejected in circumstances such as, or similar, to those where it was framed and declared.

From the foregoing we deduce this: If one or more persons acquire property, intending to promote the organization of a corporation to purchase it from them at a profit to themselves and effect such purpose, limiting the membership to interested parties till the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders, they being kept in ignorance of the true nature of such transaction, and effecting such intent, they are guilty of actionable fraud upon the corporation and responsible to it for the gains made. In such circumstances, in the making of the contract between the corporation and its agents, it is mere fiction as to its prospective members by original subscription. Since it has no one to stand for it as an adverse party in the transaction no meeting of adverse minds, essential to a binding contract, occurs. The corporation is deceived, in that advantage is

taken of its incapacity to protect itself, as to the interests of prospective memberships by the original taking of its stock.

Applying the foregoing to the situation found to exist all who were concerned in the transaction of buying the land at one price to turn it over to the corporation to be formed at a much greater one, and to induce others to come into the corporation in ignorance of the facts, contributing the actual capital necessary to enable them to fully accomplish their purpose, became liable to refund their profits to the corporation, which liability was enforcible in this action, unless prior to its commencement it was extinguished by the six-year statute of limitations.

The action was commenced May 20, 1899, long after the expiration of six years from the time the cause of action in favor of the corporation accrued, unless the date thereof was postponed, as regards the remedy for the wrong, by subd. 7, sec. 4222, Stats. 1898. It is conceded that the life of the cause of action expired before such commencement, unless such subdivision applies. That provides that a cause of action for relief on the ground of fraud in a case which was on or before the 28th day of February, 1859, cognizable in a court of chancery shall not be deemed to have accrued until the discovery by the aggrieved parties of the perpetration of the fraud. Counsel for respondent argue that this action falls within that because the sole remedy afforded plaintiffs to enforce the right of the corporation was in equity and was so at the time mentioned in such section. That overlooks the fact that the real test is, what remedy was afforded the corporation to enforce its rights in the circumstances set forth in the complaint before the adoption of the Code. We need spend no time to demonstrate that it had then, as it has now, a remedy at law in such cases. It follows that before this action was commenced a cause of action of the corporation was extinguished and that with it necessarily the right of the plaintiffs to enforce such cause of action was lost. That is dis-

tinctly ruled in *Boyd v. Mut. Fire Asso.* 116 Wis. 155, 94 N. W. 171. We are unable to discover anything in that case, or in *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5, or *Merton v. O'Brien,* 117 Wis. 437, 94 N. W. 340, referred to by counsel, that can save this case. The effect thereof is that the statute of limitations does not run in favor of a trustee of an expressed interest of that continuing nature cognizable only in a court of equity. There is nothing of that sort involved in this case as is plainly ruled in *Boyd v. Mut. Fire Asso. supra.*

It is suggested by counsel for respondents that the corporation was powerless to assert its rights within the life of its cause of action because those who were solely in charge of its affairs were the guilty persons, and by their position prevented any one during such period from obtaining knowledge of the facts so that they might act in its behalf. While counsel earnestly insist that under such circumstances the statutes of limitation ought not to apply, no authority is cited to our attention varying the unqualified language of such statutes. So far as we are advised, there is no exception to the rule of the statute to fit a case of this sort. Views elsewhere are well portrayed in *Bank of Hartford Co. v. Waterman,* 26 Conn. 324–330, thus:—

"Ignorance of his rights on the part of the person against whom the statute has begun to run, will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time. Strong equitable considerations in favor of the present plaintiffs seem, however, to grow out of the fact, that they were actually *betrayed* into ignorance of their rights by the wrongful acts of the defendant himself. . . . It is palpably unjust for the defendant to set up the statute as a defense under such circumstances; to do so is in one sense taking advantage of his own wrong. Yet it is difficult to see that he is not, by the clear provisions of the statute itself, protected in so doing.

. . . Lord CAMPBELL properly suggests, relative to a controversy not unlike to the present, that 'hard cases must not make bad law.' . . . If the dictum of Lord MANSFIELD that 'there may be cases which fraud will take out of the statute of limitations,' were confirmed by direct adjudications, we should be reluctant to withhold the application of the doctrine in the present instance."

We cannot escape the conclusion that the statute of limitations pleaded had fully run in favor of the defendants before the commencement of this action and extinguished their liability.

By the Court.—The judgment is reversed and the cause remanded with instructions to enter judgment dismissing the complaint with costs in favor of the defendants.

The respondents moved for a hearing, and the following opinion was filed January 31, 1905:

MARSHALL, J. The motion for rehearing, in this case, as all such motions which are made in the proper professional spirit are, was welcomed here and has received consideration. There was no need whatever for the learned counsel's apology for making it. It were better if they had omitted from the argument the words "Well, as I understand the aversion of this court to rehearings." It involves an assumption that has no foundation whatever. This court has no "aversion" to the assertion by any attorney of any right which the statute, court rules or the practice affords him. It has no feeling but that of respect for all considerate efforts of members of the profession to safeguard the rights of their clients and to aid the court in the proper administration of justice. Occasions have been improved to admonish practitioners to exercise care not to subject their clients to the burdens of additional cost by inconsiderate motions for rehearings, and if it be necessary in order that such admonition shall be efficient in that regard it might well be repeated. It is well appreciated here that

counsel may inadvertently overlook some important matter and that the court may do so, giving rise reasonably to the thought that if such matter had been fully presented and considered a different conclusion might have been reached. No feeling of hesitancy exists here to correct errors of counsel or the court's own errors whenever there is opportunity therefor. However diligent we may be to discover the right of any matter, mistakes are liable to occur, calling for motions for rearguments. That is well understood. The ultimate end sought by all is to weigh out justice with the greatest possible certainty and accuracy and nothing consciously is allowed here to stand in the way thereof. Certainly, no "aversion" to the reception of a motion for a rehearing so stands. The statutory right to make such motion is a valuable aid to the end sought when invoked with that careful consideration of a case which should always be devoted thereto before exercising it. *Brown v. C. & N. W. R. Co.* 102 Wis. 150, 77 N. W. 748, 78 N. W. 771; *Illinois S. Co. v. Bilot,* 109 Wis. 430, 84 N. W. 855, 85 N. W. 402. If counsel conclude that a question for any cause has been overlooked or not adequately presented, and a re-presentation of the case in that regard may, with reasonable probability, change the result, they should perform the duty to their clients and the court to make the motion to that end.

Counsel now present for consideration propositions which only incidentally, if at all, were mentioned on the former argument. They frankly confess that the importance of such propositions was not appreciated by them, if thought of seriously at all, until aroused in that regard by some questions propounded from the bench on the argument. We will say, however, at the outset, that the subjects involved did not pass here without the most careful study, as the result will now more fully indicate.

Counsel's second proposition, it would seem, ought to have first place. "The right of action at law upon the subscrip-

tion list signed by these defendants did not accrue in favor of the corporation in 1892, and it did not accrue until these plaintiff stockholders made their demand for action in February, 1899, and the defendant then denied any liability and refused to take any action." In support of that it is said there was no right of action in advance of a call being properly made and the maturity of the demand thereunder, the statute on that subject and the articles of organization of the corporation and its by-laws being referred to. We have not heard before anything to indicate that any one supposed this to be an action to recover upon the contractual liability of stockholders. There is no suggestion in the complaint that it is of that character. On the contrary, the whole theory from first to last has been that it is an action against the promoters and trustees of a corporation to recover unlawful profits they obtained while acting in a fiduciary capacity for it. The claim of the plaintiffs all through the case is that defendants, while acting in such fiduciary capacity, purchased land at one price and turned it over to the corporation ostensibly at cost, but really for an advance of over $50,000, and that to the extent of the profits so obtained they became liable to such corporation. The mere statement of the real nature of the action, which is fully set forth in the history of the case accompanying the former opinion, renders it unnecessary to say more on this point.

Counsel's next proposition is that "the defendants are estopped from setting up and receiving the benefit of the six-years statute of limitations." That presents the question of whether such statute, as to an action in favor of a corporation against its officers, runs while they themselves are the ones clothed with the sole authority to protect its interests and fraudulently neglect to do so. True, as said by counsel before and as said now, the corporation was powerless to enforce its right to recover the unlawful profits through the instrumentality of its officers, since they were the guilty parties and con-

trolled what should and what should not be done in its behalf. Formerly, we said: Counsel insist that under such a situation the statute ought not to apply, but no authority is cited to our attention as a basis for varying the unqualified language thereof, and so far as we can discover there is none to fit the case in hand. Reflection has resulted in counsel planting themselves squarely and confidently on the unqualified doctrine that the statute of limitations does not run in favor of one seeking to take advantage of it, as to a cause of action based on fraud, so long as the adverse party has no knowledge of the facts constituting such fraud. A large number of authorities are cited to our attention as supporting that view, commencing with *Encking v. Simmons,* 28 Wis. 272, where DIXON, C. J., used language by way of argument suggesting that a view was then entertained, at least by himself, that the statute of limitations might be avoided for actual fraud. No question in that regard, however, was in any wise involved in the case, even incidentally, nor was the doctrine suggested indorsed as good law by the writer of the opinion, except inferentially:

"There is (said the chief justice), for example, very much and very high authority for saying that the bar of the statute of limitations may be avoided at law for fraud in the party seeking to take advantage of it."

True, there is such authority that way, but also true when analyzed the same is found to have no application whatever to a situation wholly otherwise regulated by statute, as in this state. It is significant that the remark quoted, though made over thirty years ago, has not since been referred to in any opinion in this court, and that the doctrine there said to be supported by "very much and very high authority" has never been incorporated into our system. A brief history of such doctrine will fully clear up all uncertainty, if any exists, as to whether it should be adopted here.

The whole system of extinguishing rights, or rights of ac-

tion, by delay in their enforcement is really statutory. True, at an early day in England by the dictum of Lord MANSFIELD in *Bree v. Holbech,* 2 Doug. 654, the idea is said to have been originally advanced that fraudulent concealment prevents the running of the statute of limitations. It is truly said by the text-writers that such idea was never judicially incorporated into the English sytem as law, but was by act of Parliament. At an early day in this country it was adopted by some of the states, notably by Massachusetts and Maine, and later was adopted by some others. It was incorporated into the statutes of many of the states in some form, in some cases being restricted, either expressly or by judicial construction, to actions at law, and in others to actions in equity. That accounts for all of the decisions referred to in *Encking v. Simmons,* and the large addition now cited to our attention by counsel. In Wood, Limitations (2d ed.) § 274, the matter is referred to in these words:

"In Massachusetts, before the present statutory exception existed, the fraudulent concealment of a cause of action was held to be a good replication to a plea of the statute. In Maine, also, this rule was adopted. The doctrine of these cases was predicated upon a dictum of Lord MANSFIELD, in an English case; but this dictum seems never to have been followed in the English cases in actions at law, nor do the American cases before cited seem to have been generally followed in this country."

There are three general classes of authorities found in the books on the subject under discussion and unless the statutory differences giving rise thereto are appreciated one is quite liable to fall into confusion as to how the law ought to be declared under a statute like ours. The first includes the states where there is no statute on the subject, holding that fraud concealed by the person invoking the statute of frauds postpones its operation. They are, in the main, the following: Massachusetts and Maine, prior to the adoption of their statutes on the subject, Vermont, Rhode Island, New Hampshire,

Louisiana, New Jersey, Arkansas, Delaware, Pennsylvania and Texas. Sixteen of the cases cited by counsel are from those states. That they throw no light on what the rule ought to be where the matter is governed by statute, seems plain. The second class includes the states having a general statutory exception to the running of the limitation statutes in case of concealed fraud until the discovery of the facts by the injured party. They are: Maine and Massachusetts, after the adoption of their present statute, Connecticut, Alabama, Georgia, Indiana, Illinois, Mississippi, Maryland, Michigan and New Mexico. Ten of the cases cited to our attention are from those states, and no time need be spent in showing their inapplicability to the case in hand. The third class includes states having such a statutory exception in cases cognizable in equity, or solely so cognizable. They are: Iowa, Colorado, Florida, Kentucky, North Carolina, South Carolina, Kansas, Missouri, New York, Ohio, Nebraska, Nevada, California, Arizona, Minnesota, Utah, Idaho, Montana, Wyoming and this state. Of the sixty or more cases cited by counsel, there is no Wisconsin case,—except *Encking v. Simmons*, 28 Wis. 272, which decided nothing on the subject, as we have seen,—and no others in such class, except *Oakland v. Carpentier*, 13 Cal. 540; *Ryan v. L., A. & N. R. Co.* 21 Kan. 365; *Ft. Scott v. Schulenberg*, 22 Kan. 648; *Arnold v. Scott*, 2 Mo. 14. An explanation of those cases can be very briefly given. The California case was not an action at law, or an equitable action to enforce one at law, as is the case before us, but was strictly an action cognizable only in equity, and so in harmony with the statute on the subject. The court held that the limitation period did not begin until the discovery of the facts constituting the fraud. The same is true of the first of the Kansas cases referred to, and the other, so far as it touches on the subject at all, seems to be against the contention counsel seeks to maintain. As to the Missouri case, counsel was either misled by the syllabus, which does not correctly state

the rule of the case, into citing the decision, or by a citation in some publication where the author was so misled. The decision was based on a clause of the Missouri statute which provided that any obstruction of the action, whether by direct or indirect means, will, while it lasts, postpone the running of the limitation period. We have no such statute. The case was explained and limited in *Smith v. Newby,* 13 Mo. 159, where it was said that the syllabus was misleading.

As to concealed fraud postponing the running of the statute of limitations respecting a cause of action at law, it has been expressly repudiated in the following states having statutes similar to ours: New York, *Troup v. Smith's Ex'rs,* 20 Johns. 33; Kentucky, *Ellis v. Kelso,* 18 B. Mon. 296, where a clerk made a fraudulent entry upon his employer's books, and it was held that the statute ran from the date of the entry; North Carolina, *Hamilton v. Shepperd,* 3 Murph. 115; South Carolina, *Miles v. Berry,* 1 Hill, 296, where the maker of a note fraudulently obtained possession of it, and kept it until the statute had run upon it, and it was held that such fraud did not prevent the running of the statute. The same rule has been declared in the following cases belonging to the first class, or having a statutory provision like that which ruled *Arnold v. Scott,* 2 Mo. 14: Mississippi, *Wilson v. Ivy,* 32 Miss. 233; Virginia, *Rice v. White,* 4 Leigh, 474. The same rule prevails in states belonging to the second class: Tennessee, *York v. Bright,* 4 Humph. 312; *Smith v. Bishop,* 9 Vt. 110; *Fee's Adm'r v. Fee,* 10 Ohio, 469.

Thus it will be seen that of all of the authorities cited by counsel there is no support whatever for the proposition advanced that under a statute such as ours the running of the statute of limitations, except in the particular class of cases referred to in such states, is affected by fraud, while a careful classification of them with reference to the statutory differences under which they were made and judicial declarations all, directly or by implication, sustain the conclusion to which

we formerly arrived. There are expressions of judges of great ability to the effect that there is much conflict and confusion in the authorities on this subject, but it is believed that the supposed conflict does not exist in fact to any considerable extent. Substantially all of what appears to have led to a contrary view, by a proper classification of the decisions according to the various statutes, will be found to have no real basis. We have not attempted here to do more than to classify them in a general way.

Counsel suggest that the language quoted in our former opinion from *Bank of Hartford Co. v. Waterman,* 26 Conn. 324, is not authoritative because it was entirely unnecessary to the case, and, further, because many cases could have been found at that time where it had been held that fraud, concealed, prevented the running of the statute of limitations. True, there were such cases and we have briefly, but fully, explained them in harmony with the views formerly expressed. The quotation voices the law under the Connecticut statute.

Several federal cases are cited to our attention, which, when rightly understood, are unimportant. *Bailey v. Glover,* 21 Wall. 342, is the most significant of them. That is to the effect that under the federal system the rule is, as to cases not governed by state statutes and decisions, the court being left free to declare the law according to its own views, and there being no federal statute interfering therewith, the running of the statute of limitations is postponed in case of fraud, concealed by the party invoking such statute, till the adverse party discovers the same. If there had been a United States statute expressly providing when fraud shall so operate, the decision would doubtless have been that all cases not covered thereby were excluded. In *Troup v. Smith's Ex'rs,* 20 Johns. 33, the court was urged to engraft on the statute of limitations of New York an exception saving actions at law from the operation of such statute in case of concealed fraud, preventing

their being commenced within the limitation period, and replied thereto, thus:

"The dictum of Lord MANSFIELD, in *Bree v. Holbech,* 2 Doug. 654, is the only instance in which such a position was ever advanced in Westminster Hall; and when it is further considered, that his lordship had an inclination to entrench on courts of equity, that mere dictum cannot be regarded as authority. . . . Courts of law are expressly bound by the statute. . . . I know of no dispensing power which courts of law possess, arising from any cause whatever." The court said further, substantially: The statute having made provision for the postponement of the running of the statute of limitations in certain cases it would be an assumption of legislative authority to introduce any other. "The plaintiff's case may be a hard one; but that affords no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands."

That decision made over seventy years ago has stood the test of time without a word of criticism in New York, or elsewhere under a like statutory system to that which the court had under consideration.

In *Miles v. Berry,* 1 Hill, 296, speaking on the same subject, the court said:

"Many of the difficulties, in cases upon the statutes of limitations, have arisen from losing sight of the words of the statute, and looking to what appeared to be just and right between the parties. The judges here and elsewhere have, however, set about the work of reform in this respect, and are now endeavoring to conform to the statute." To allow the time of the discovery of the fraud to be regarded as that of the maturity of the injured party's cause of action "would be to make and allow, by judicial construction, an exception to the statute of limitation, which the legislature did not think proper to make."

In line therewith Chancellor KENT said in *Demarest v. Wynkoop,* 3 Johns. Ch. 129–142: "The doctrine of any inherent equity creating an exception as to any disability, where

the statute of limitations creates none, has been long, and, I believe, uniformly exploded. A statute is to be read as it is written without any arbitrary substitution or addition to its meaning." To the same effect are *Carden v. L. & N. R. Co.* 101 Ky. 114, 39 S. W. 1027; *Powell v. Koehler,* 52 Ohio St. 103, 39 N. E. 195; 19 Am. & Eng. Ency. of Law (2d ed.) 212.

In the light of the foregoing, it would seem that the right of the matter under discussion is unmistakable. The statute, sec. 4222, Stats. 1898, provides that "the cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." By one of the most familiar canons of construction all other cases are thereby excluded. *"Expressio unius est exclusio alterius."* The mere fact that the enforcement of the statute according to the foregoing leads occasionally, as it does seemingly in this case, to great hardship does not furnish the slightest reason why the courts should ingraft an exception upon it. The enactment of the lawmaking power within its legitimate field must not be obstructed by the judicial administration. Such power is ample, if it sees fit, to extinguish any right enforcible by an action, if judicial remedies for such enforcement are not invoked within such reasonable time as it sees fit to name. The possessor of the right may be under disability to personally enforce the same within the prescribed period by reason of infancy, insanity, imprisonment or other cause, and yet the statute in general terms, not containing any exception to save the right, will extinguish it. *Vance v. Vance,* 108 U. S. 514, 521, 2 Sup. Ct. 854; *Carden v. L. & N. R. Co. supra.* The legislature is the judge, and the sole judge in such matters, subject to no judicial review whatever, so long as it acts within the boundaries of reason. It is far better that occasionally one should suffer severely from the enforcement of the law, as the court finds it, than that they should endeavor to bend the law out of its manifest

scope to avoid that result. The truth of the saying that "hard cases make bad law" we need not go far to demonstrate. After courts have done all that they can by the exercise of the greatest diligence to steer clear of the danger in that regard they cannot hope to be universally successful.

We should not close this opinion without referring, at least briefly, to the doctrine urged upon our attention that equity will always furnish a remedy for any wrong, other than a mere moral transgression, if legal remedies are inadequate or do not exist at all. It is not infrequently that we see that valuable doctrine invoked where it has no proper place. It is never applicable to give a remedy for a wrong, so called, which is not a wrong at all, because the written law makes it otherwise. Such wrongs, if the injuries may be so designated at all, are not within the maxim "there is no wrong without a remedy." *Rowell v. Smith, ante,* p. 510, 102 N. W. 1.

The last suggestion of counsel is that respondents having proceeded in good faith should not be made to pay costs in this court or in the court below. Such a practice, if once adopted, would compel the defendant in most any case to wholly bear the burden necessary to his defense, since, generally, the plaintiff thoroughly believes in his side of the case. There is no good reason for making this case an exception to the general practice of awarding costs to the defendant where in an equity action he prevails as to the entire cause of action set forth in the complaint. According to the conclusion to which we have arrived the defendants have so prevailed.

By the Court.—The motion is denied.

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1. In an action of ejectment, the evidence on the subject of adverse possession, is *held* sufficient to carry that question to the jury. *Illinois Steel Co. v. Jeka,* 419
2. In the determination of the question of adverse possession, possession dependent upon marked boundaries under subd. 1, sec. 4214, Stats. 1898, must not be confused with that accompanied by actual improvement of the premises under subd. 2 of said sec. 4214. *Ibid.*
3. The physical taking and enjoyment by acts sufficient, reasonably, to suggest to the true owner that his dominion is thereby defied and the extent thereof, satisfies all the essentials of certainty as to the boundaries of adverse possession, dependent on cultivation or usual improvement, and is sufficient to disseize the true owner, not only of the particular spot where the first visible disturbance of the surface occurred, but of surrounding

land, the hostile possession of which is plainly thereby suggested *Ibid.*

4. Whether the essentials of adverse possession are satisfied or not by a given state of circumstances must be determined by the verdict of the jury, under proper instructions. *Ibid.*

ADVERSE WITNESS. See WITNESSES, 5.

AGENCY. See BROKERS. CORPORATIONS, 11. INSURANCE, 1–4. MORTGAGES, 2. NEGLIGENCE, 13. PRINCIPAL AND AGENT. REPLEVIN. SALES, 9, 10. SETOFF, 3. TRIAL, 1. WITNESSES, 2.

AGGRIEVED PARTY. See APPEAL, 2. LIMITATION OF ACTIONS.

AMBIGUITY. See CONTRACTS, 3. DESCENT AND DISTRIBUTION, 3, 5. INSURANCE, 5. SALES, 7.

AMENDMENT.
Of claim for lien. See MECHANICS' LIENS, 7.
Of pleading. See MECHANICS' LIENS, 7, 9. PLEADING, 3, 4.

ANIMALS. See TRESPASS.

ANSWER. See ADMIRALTY. EJECTMENT, 1, 3. GARNISHMENT, 5.

ANTICIPATION. See ESTOPPEL, 1. NEGLIGENCE, 2, 8, 11. RAILROADS, 6. TRIAL, 6, 7, 15.

APPARENT AUTHORITY. See BILLS AND NOTES, 10. SETOFF, 3.

APPEAL AND ERROR.

Decisions reviewable: Appealable orders.

1. Under sec. 3069, Stats. 1898, an order denying plaintiff's motion to correct a special verdict and enter judgment thereon in his favor is not appealable, and an appeal therefrom will be dismissed. *Wolfgram v. Schoepke,* 19

Who may appeal: Party aggrieved. See GARNISHMENT, 2.

2. In an action to foreclose a mortgage, a defendant, who had before the commencement of the action conveyed his entire interest in the lands in question to his codefendant, and against whom no personal judgment is rendered, is not aggrieved in any way by the judgment, and under sec. 3048, Stats. 1898, is not entitled to appeal from the judgment. *Schneider v. Reed,* 488

Reservation in lower court of grounds of review: Exceptions.

3. The pleadings and findings in an action must show a state of facts from which the legal liability which is embodied in the judgment necessarily follows, or the judgment will be reversed notwithstanding the absence of exceptions. *Newbold v. Douglas,* 28

4. General exceptions taken to portions of the charge to the jury which includes two or more distinct propositions, do not present any question for review. *Lowe v. Ring,* 370

5. Where the record discloses that appellants requested the court to find specifically on an issue, and that exceptions were taken to refusals so to find, as well as to the findings actually made, this is sufficient to entitle appellants to a review of that issue by the supreme court. *Davelaar v. Milwaukee,* 413

6. The appellate court will not review remarks made by the trial court on overruling an objection to testimony, where, while exception was taken to the overruling the objection to the testi-

mony, no exception was taken to the language of the court. *Lightfoot v. Winnebago Traction Co.* 479

7. An exception should be taken to the effective act of the court, and not to a mere expression of opinion preliminary thereto. *Wheeler v. Seamans,* 573

8. The record on appeal is *held* to show that an exception taken, though interpolated before the effective ruling of the court, should be deemed to apply to the act of directing the verdict. *Ibid.*

9. A finding of fact on any question is conclusive where no exception is reserved thereto. *Smith v. N. W. Nat. L. Ins. Co.* 586

Same: New trial.

10. Where the court directs a verdict, a motion for a new trial is not necessary to permit the appellate court to consider whether the evidence supports the verdict. *Wheeler v. Seamans,* 573

Time for taking appeal from judgment. See MORTGAGES, 8.

11. Under sec. 3039, Stats. 1898, limiting the time within which an appeal may be taken from a judgment, an appeal taken February 4, 1904, from a judgment entered November 3, 1900, is too late, and will be dismissed. *Pereles v. Leiser,* 233

Assignment of errors.

12. Where no attention is paid in the argument to an assignment of error except to refer to the record and suggest: "While we submit that in portions of the charge of the court, to which exceptions were taken, as shown in the record, there was error, we will not trouble the court with further discussion of them," the supreme court will not search the record, carefully, to determine whether the instructions were, or were not, strictly accurate. *Illinois Steel Co. v. Jeka,* 419

13. Where appellant does not assign error to the making of a specific finding, the supreme court is relieved from any consideration of whether the finding is supported by the evidence, and will accept the finding as a fact. *Sherry v. Madler,* 621

Review: Findings when disturbed. See TAXATION, 7.

14. To set aside the findings made by a trial court, they must appear to be contrary to the clear preponderance of the evidence. *First National Bank v. Buetow,* 285

15. Where a question is not presented by the pleadings, nor litigated on the trial, the refusal of the trial court to determine such question is affirmed. *School District No. 9 v. School District No. 5,* 289

16. Findings of fact made by a trial court are to be deemed verities in support of the judgment rendered thereon, unless from the record it appears that they are contrary to the clear preponderance of the evidence. *Hutchins v. Bautch,* 394

Affirmance: Equally divided court.

17. Where the justices of the supreme court are equally divided on a question vital to the result on the appeal, the judgment is affirmed *ex necessitate. Jacobs v. Queen Ins. Co.* 608

18. In such case no opinion will be filed. *Ibid.*

19. Where the justices of the supreme court are equally divided, the judgment appealed from is affirmed. *Swenson v. Flint,* 613

Affirmance and reversal. See ACTION, 2. APPEAL, 3–9, 14–19, 29–35. ASSAULT AND BATTERY, 7, 9–11. CERTIORARI. CUSTOM AND USAGE, 1. EJECTMENT, 3. EVIDENCE, 6, 8. GARNISHMENT, 5. HIGHWAYS, 3. LIENS, 3. MASTER AND SERVANT, 2. MECHANICS' LIENS, 8. MORTGAGES, 4, 9. MUNICIPAL CORPORATIONS, 8. NEGLIGENCE, 3–7, 13. NEW TRIAL, 2. PLEADING, 4. PRINCIPAL AND SURETY, 2. SALES, 7. STREET RAILWAYS, 5. TAXATION, 2, 17. TRIAL, 2, 4–6, 9–12, 14–16, 23, 28, 30. WITNESSES, 6, 7, 9, 10.

20. When an examination of the evidence discloses no direct or circumstantial proof conflicting with plaintiff's claim of ownership of property in question, nor that his testimony is the only proof on that subject, it is not error to refuse to submit the question of ownership to the jury. *Roberts v. Francis,* 78

21. In an action tried by the court, the improper admission of evidence is not available as error on appeal. *Currie v. Michie,* 120

22. In such case, it is sufficient that evidence properly admitted supports the findings. *Ibid.*

23. It is not error to confirm the findings of a referee where they are supported by the evidence. *Laev Lumber Co. v. Auer,* 178

24. Error cannot be assigned to the admission of testimony which was afterwards stricken out and the jury instructed to disregard. *John O'Brien Lumber Co. v. Wilkinson,* 272

25. Where the evidence discloses no clear preponderance against the material findings of fact, the judgment is affirmed. *Tate v. Jerman,* 368

26. Rulings of the trial court, sustaining objections to questions asked on cross-examination, which are not clearly prejudicially wrong, will not be condemned on appeal. *Illinois Steel Co. v. Jeka,* 419

27. In an action of ejectment, where the defense was twenty years' adverse possession, dependent on actual improvement of the premises, it is not error to sustain objections to a question calling for the precise boundaries of such possession, since it is only necessary that the premises should be put to use by acts of dominion, such as to suggest, reasonably, the extent of the hostile invasion. *Ibid.*

28. Where, in an action for the purchase price of timber, the court found that plaintiff did not own the timber, but failed to find as to whether plaintiff had become the owner of the proceeds of the sale, and the evidence as to plaintiff's ownership of such proceeds was in sharp conflict, it was error to award judgment for plaintiff. *Bovo v. D. M. Fulmer Lumber Co.* 614

Same: Material and immaterial error. See APPEAL, 26. ASSAULT AND BATTERY, 3, 5, 7, 9. EJECTMENT, 4. INDICTMENT AND INFORMATION. INSURANCE, 13. MORTGAGES, 3. STREET RAILWAYS, 6. TRIAL, 6, 7, 12, 13.

29. In an action tried by the court, it is not material error to refuse to strike out testimony that is without probative force, or to sustain objection to a question calling for nothing material to the issues in the case. *Currie v. Michie,* 120

30. Evidence being admissible, when offered, as tending to prove an issue raised by the pleadings, it is not prejudicial error to fail to restrict the consideration of such evidence to that purpose, where no specific objection was made on that ground, nor re-

quest to so restrict the consideration thereof. *John O'Brien Lumber Co. v. Wilkinson,* 272

31. Error in admission of evidence under a claim of offset to a counterclaim, if any, is immaterial, where such claim of offset was withdrawn and the jury found no cause of action existed under the counterclaim. *Ibid.*

32. It is not prejudicial error to rule out a question asked for the purpose of laying the foundation for impeachment, when it refers to immaterial matter. *Illinois Steel Co. v. Jeka,* 419

33. It is not prejudicial error to refuse to permit a witness to answer a question, where, in answer to several other questions, he has given the information sought. *Ibid.*

34. Where the jury have found in favor of one party on a given question, no portion of the instructions to the jury on that question can be said to have prejudiced such party in its determination. *Lightfoot v. Winnebago Traction Co.* 479

Res adjudicata: Former appeal. See APPEAL, 40. CORPORATIONS, 10. JUDGMENTS, 2, 3. MECHANICS' LIENS, 10. MORTGAGES, 8. TAXATION, 1.

35. It is not error to sustain a demurrer *ore tenus* to a counterclaim, which had already been held by the supreme court to state no cause of action in favor of defendants and against the plaintiff. *John O'Brien Lumber Co. v. Wilkinson,* 272

36. A decision of the supreme court as to the *quantum* of damages recoverable on a given state of facts is *res adjudicata,* where there is no material difference between the evidence in the second trial and that on the first, as to the loss plaintiff has suffered, or will suffer, resulting from his injury. *Rueping v. C. & N. W. R. Co.* 319

37. Where on a second trial after reversal on appeal, the evidence produced on the issue of defendant's negligence was substantially the same as on the first trial, except that defendant produced more evidence tending to refute its negligence, such evidence not being of the class, such as some indisputable physical fact, which of itself rendered the evidence tending to show negligence necessarily incredible, the question upon the issue of actionable negligence is foreclosed by the former decision. *Zimmer v. Fox River Valley E. R. Co.* 643

38. Where on two former occasions the supreme court has held the circumstances alleged in a complaint constitute a good cause of action in favor of a corporation against the defendants, the sufficiency of the complaint to support a judgment is *res adjudicata. Pietsch v. Milbrath,* 647

39. In such case, it is *held* that the facts, stated in the opinion, supported the judgment. *Ibid.*

Dismissal. See APPEAL, 1, 2, 11.

Rehearing, when not granted.

40. Where, on appeal, a cause has once been decided, a rehearing will not be granted as to questions already considered, unless it is rendered necessary by a change in the views of one or more of the justices participating in the matter at first. *Jacobs v. Queen Ins. Co.* 608

APPLICATION OF PAYMENTS. See LIENS, 2, 3.

ARBITRATION AND AWARD. See INSURANCE, 12. SPECIFIC PERFORMANCE, 2, 3.

ASSAULT AND BATTERY.

1. Where a claim for rent was the subject of contention between the parties immediately before they came to blows, and, in an action for the assault and battery, plaintiff had testified concerning such claim on his direct examination, a question asked plaintiff on cross-examination is *held* proper for the purpose of informing the jury whether the claim was made to annoy and provoke defendant, or was made in an attempt to collect a demand which in good faith was believed to be due. *Lowe v. Ring*, 107

2. In an action for assault and battery, evidence showing that plaintiff had committed particular assaults and batteries at different times, covering a period of from four to seventeen years prior to the time of the instant affray, is incompetent, and cannot be justified on the ground that it might tend to show that the injuries complained of had been received in such former assaults, and that plaintiff had been in the habit of employing a physician only in those cases in which he intended to claim and sue for damages for personal injuries. *Ibid.*

3. In an action for assault and battery, evidence that plaintiff had committed particular assaults and batteries at times covering a period of from four to seventeen years prior to the instant affray, is incompetent and immaterial for the purpose of showing that plaintiff's character was quarrelsome and pugnacious, and its admission over plaintiff's objection is prejudicial error. *Ibid.*

4. In an action for assault and battery, where self-defense is pleaded, evidence of plaintiff's general reputation as a quarrelsome and pugnacious person is admissible. *Ibid.*

5. In an action for assault and battery, an instruction, stated in the opinion, is *held* erroneous and prejudicial in so far as it submitted the question of former particular instances of plaintiff's misconduct in violating law as competent evidence in the case. *Ibid.*

6. In an action for assault and battery, where self-defense is pleaded, proof of plaintiff's quarrelsome character may be considered by the jury, with other relevant testimony, in determining what compensation he is entitled to recover for injuries to his feelings. *Ibid.*

7. In an action for assault and battery, where the facts and circumstances were such that the jury might reasonably have drawn the inference that defendant acted maliciously and wantonly in assaulting the plaintiff, it is error to instruct the jury on the subject of punitory damages, in substance, that, since the altercation arose out of a business transaction, which led defendant to beat plaintiff, it refuted all inference of malicious or wanton conduct. *Ibid.*

8. In actions for assault and battery, it is not necessary that the defendant be imbued with malice for any length of time before the assault to subject him to exemplary damages; it is sufficient that malice prompted the assault, though it existed but for a moment before the blow was struck. *Ibid.*

9. In an action for assault and battery, where the evidence as to the injuries conflicted in many material and important respects, it is not error for the trial court to refuse to grant a

new trial upon the ground that the compensatory damages awarded are wholly inadequate to the injuries proven. *Ibid.*

10. In an action against an overseer of highways for an assault and battery upon one working under him, an instruction, stated in the opinion, is *held* erroneous, in that it admits of the construction that, if the defendant had discharged the plaintiff, the defendant was entitled to take the scraper from plaintiff's possession by force, if the force used was reasonable and proper to accomplish the purpose. *Monson v. Lewis,* 583

11. In such case, where the giving of the blow by defendant and the consequent damage was admitted, an instruction, stated in the opinion, is *held* erroneous, in that it might well be understood as meaning that the plaintiff, after proving the blow, was obliged to prove that there was no justification. *Ibid.*

12. In assault and battery where the blow and consequent damage is admitted by the defendant, a *prima facie* case is made, and the burden then lies upon the defendant to prove facts constituting a justification therefor. *Ibid.*

ASSESSMENT. See INSURANCE, 16. TAXATION, 4–17.

ASSESSOR. See TAXATION, 4–17.

ASSIGNMENT.
Of contracts. See BILLS AND NOTES, 8–11. SETOFF, 1.
Of errors. See APPEAL, 12, 13.

ASSUMPTION OF RISK. See NEGLIGENCE, 2, 3. STREET RAILWAYS, 2.

ATTORNEY AND CLIENT. See EXECUTORS AND ADMINISTRATORS, 5, 7.

AUTHORITY. See BILLS AND NOTES, 1, 2, 10. INSURANCE, 4. PRINCIPAL AND AGENT. SETOFF, 3.

AVERAGE. See ADMIRALTY.

BAILMENT. See EVIDENCE, 7. INSURANCE, 5–10.

BANKS AND BANKING. See PRINCIPAL AND SURETY, 1, 2.

BASTARDY.

1. Defendants, as principal and surety, gave plaintiff a bond which recited the arrest of the principal on a charge of bastardy upon the plaintiff. The recited consideration of the bond was the withdrawal and abandonment of such proceedings, and an agreement of marriage with and support of the prosecutrix. The condition of the bond was, in case the principal should fail to perform, that payment should be made to the county judge. The bond further provided that in case the amount to be paid for the support of the prosecutrix could not be agreed upon by the parties, the amount should "be determined by the aforesaid county judge, and shall be furnished and paid in the manner and way he may designate." In an action against the obligors on such bond the complaint was silent as to whether the plaintiff was or was not a married woman. On demurrer for legal incapacity to sue because plaintiff was a married woman, *held:*
(1) The court could not assume, because the bond recited that the bastardy proceedings were agreed to be discontinued in consideration of an agreement to marry, that such agreement had been consummated.

(2) Even if plaintiff were a married woman, the beneficial right under the bond was her sole and separate property, in regard to which, under sec. 2345, Stats. 1898, she is expressly authorized to sue in her own name.

(3) Even if plaintiff were a married woman, the husband was the adverse party, in which situation she is expressly authorized to sue in her own name. (Sec. 2608, Stats. 1898.) *Meyer v. Meyer*, 538

2. In such case, there was no defect of parties, since if it is true that the plaintiff only has a beneficial interest in the bond, while the legal right to sue on it is in the county judge, the error goes to the cause of action, not to a defect of parties plaintiff. *Ibid.*

3. In such case, the county judge is the trustee of an express trust, and, in the absence of allegation of neglect or failure of the county judge to perform the duties imposed by the bond, such complaint is fatally defective as not stating a cause of action. *Ibid.*

4. In such case, the fact that plaintiff is beneficially interested in the execution of the trust, does not make her the real party in interest, within the meaning of sec. 2607, Stats. 1898. *Ibid.*

5. A bond, given in settlement of a bastardy proceeding, conditioned for the support of the prosecutrix and her child in consideration of the discontinuance of the proceeding, is not against public policy, since by sec. 1532, Stats. 1898, the proceeding is one proper for settlement by contract involving the discontinuance of the prosecution. *Ibid.*

6. A bastardy proceeding is neither a civil nor criminal action, strictly speaking, but is a mere statutory proceeding. *Ibid.*

7. The provisions of sec. 1532, Stats. 1898, requiring, in bastardy proceedings, official approval of the settlement with the mother as a prerequisite to the right of the accused to his discharge, is designed for the protection of the injured female, not of the public. *Ibid.*

8. A settlement of a bastardy proceeding, made by the accused, without the official approval required by sec. 1532, Stats. 1898, is a waiver by him of the statute, and also by the woman, so far as she is competent in that regard. *Ibid.*

9. A bond, given in settlement of a bastardy proceeding, conditioned for payment unless the prosecutrix and defendant "shall live together as husband and wife," is not a contract for a voluntary separation. *Ibid.*

10. Where a bond, given in settlement of a bastardy proceeding, provided that "the amount to be paid (the prosecutrix), if the same cannot be agreed upon by the parties hereto, shall be determined by the county judge, and shall be furnished and paid in the manner and way he may designate," no right of action matures until the county judge makes his determination. *Ibid.*

BENEFICIAL ASSOCIATIONS. See INSURANCE, 14–18.

BETTERMENTS. See VENDOR AND PURCHASER, 3–7.

BIAS. See WITNESSES, 10, 11.

BILL OF LADING. See ADMIRALTY.

BILLS AND NOTES.

Negotiability. See ESTOPPEL, 2. MORTGAGES, 2, 7.

Same: Blanks: Authority to fill.

1. A promissory note was upon a printed form which, after the printed words "pay to the order of," contained a single blank line terminating in the word "dollars." In this blank line the words "twenty-five hundred" were written at the extreme left of the line, so as to leave no space whatever in front of them for the name of a payee, and were joined to the printed portion without physical break or separation. A warrant of attorney, embodied in the note, provided that judgment might be confessed in favor of the holder. *Held:*

   (1) That part of the writing which sought to express the promise made, showed an intent that it be payable only to some person, or that person's order, and negatived intent to make it payable to whoever might happen to acquire possession, without indorsement, from the original payee.

   (2) The mere authority to confess judgment in favor of the holder was insufficient to overcome the clear declaration that the note was payable to the order of a person intended to be named, but who by mistake was not named.

   (3) It being a promise to pay, other than to bearer, which was not certain as to the payee, it was not negotiable. *Smith v. Willing,* 377

2. In such case, the writing being joined to the printed portion without physical break or separation, the omission of the name of the payee was not the leaving of a blank which the plaintiff, as possessor, was thereby impliedly authorized to fill. *Ibid.*

3. In such case, under the further facts, stated in the opinion, it is *held* that the instrument being non-negotiable the plaintiff could gain none of those technical advantages which run with negotiable instruments, and, it being an attempt to enforce a liability defendant never had agreed to assume, a defense of non-liability was meritorious and equitable. *Ibid.*

4. While an ordinary negotiable note, accompanied by the ordinary real-estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, and are parts of the same transaction, each relates to its own subject matter, and does not interfere with the other. Covenants in the mortgage to pay taxes and exhibit the receipts, to effect and maintain insurance on buildings for mortgagee's benefit, and that in case of default the mortgagee may insure and have a lien for the amount of premiums and taxes paid "added" to the amount of note, are simply agreements for the preservation of the security, are not intended nor fitted to qualify or affect in any way the absolute promises of the note, and do not enter into or change the note in the least, nor affect its negotiability. *Thorp v. Mindeman,* 149

5. Under secs. 1675—1, 1675—2, and 1675—4, ch. 356, Laws of 1899, an ordinary promissory note, secured by a real-estate mortgage, is negotiable, although it provided that on default in interest or failure to comply with any of the conditions of the mortgage, the whole principal should, at the option of the mortgagee, become due and payable. *Continental Nat. Bank v. McGeoch,* 73 Wis. 332, and *W. W. Kimball Co. v. Mellon,* 80 Wis. 133, overruled. *Ibid.*

6. In an action to foreclose a mortgage, the negotiability of the note accompanying the same considered, and *Thorp v. Mindeman, ante*, p. 149, followed. *Loizeaux v. Fremder*, 193

Same: Transfer by indorsement.

7. Under sec. 1676—8, ch. 356, Laws of 1899, the addition of the words "without recourse" to an indorsement on the back of a negotiable note: "For value received, I hereby sell, transfer and assign the within note," does not impair the negotiable character of the instrument. *Thorp v. Mindeman*, 149

8. Such indorsement is a commercial indorsement, and not a mere assignment, and, when accompanying a transfer before maturity, the transferee takes the note freed from all equities. *Ibid.*

Same: Payments to assignor: Negligence.

9. A debtor must pay a negotiable instrument to the person who owns it at the time of payment, or to an agent of such owner actually authorized to receive payment. No payment to any other person can be effective unless made in reliance upon actual possession of the note, or upon words or acts of the owner so unambiguously declaring the authority of such other person to receive such particular payment, as to estop the owner from denying such authority. *Ibid.*

10. Possession of a negotiable instrument is generally the sole adequate evidence of *apparent* authority to collect upon which the debtor can, without negligence, rely. *Ibid.*

11. Plaintiff, assignee of a negotiable note secured by mortgage, continuously retained the instruments in her possession, but from time to time delivered the interest coupons to the original mortgagee, to whom payments of interest and also of principal were made. Under the further facts, stated in the opinion, *held:*
(1) Such payments were not binding on the plaintiff.
(2) Even if plaintiff's silence at the time payment was extended might have confirmed the mortgagor in the belief that the mortgagee then owned the securities, she was not estopped to deny such ownership at any subsequent time. *Ibid.*

Action on. See DESCENT AND DISTRIBUTION, 5.

Payment and discharge. See PRINCIPAL AND SURETY, 1, 2.

BLANKS. See BILLS AND NOTES, 1, 2.

BOARD OF REVIEW. See TAXATION, 5–17.

BONDS. See BASTARDY. EXECUTORS AND ADMINISTRATORS, 6, 7. PRINCIPAL AND SURETY, 3. TRUSTS AND TRUSTEES, 4.

BOUNDARIES.

See ADVERSE POSSESSION, 2, 3. APPEAL, 27. NAVIGABLE WATERS. TRESPASS.

1. The owner of the bank of a stream presumably owns the bed thereof to the thread of such stream subject to public rights. *Walls v. Cunningham*, 346

2. In such case, some clear evidence to the contrary is necessary to rebut that presumption, and mere evidence of the conveyance

of all of a certain tract of land on a specified side or bank of such stream, or of land giving the meander line of such stream as a boundary, is not sufficient. *Ibid.*

BREACH OF WARRANTY. See SALES, 11.

BRIDGES. See MUNICIPAL CORPORATIONS, 6, 7.

BROKERS.

See INSURANCE, 1–4.

1. Where there is a conflict as to what was the original agreement between a real-estate broker and the owner, that issue is one necessarily to be determined by the jury. *Teesdale v. Bennett*, 355
2. In an action by a real-estate broker for commissions alleged to have been earned, the evidence, stated in the opinion, is *held* not to sustain a contention that the original agreement was superseded by a subsequent contract between plaintiff, defendant and a third broker. *Ibid.*

BUILDING CONTRACTS. See MECHANICS' LIENS. SUNDAY, 2.

BUILDINGS. See RAILROADS, 6.

BURDEN OF PROOF. See ASSAULT AND BATTERY, 11, 12. EVIDENCE, 1, 2. SIGNATURES, 1. TRIAL, 11.

CANCELLATION. See INSURANCE, 2, 4.

CARELESSNESS. See NEGLIGENCE, 8, 11.

CARRIERS. See ADMIRALTY. RAILROADS. STREET RAILWAYS.

CERTIORARI.

See INTOXICATING LIQUORS, 4. TAXATION, 5, 7, 16.

1. The scope of the writ of *certiorari* to a nonjudicial body is not as broad as a writ of error as to permitting a review of evidence, and if there is reasonable ground for belief that the body's conclusion is the result of honest judgment it cannot be disturbed. *State ex rel. N. C. Foster Lumber Co. v. Williams*, 61
2. A nonjudicial body, up to the dividing line between error in the exercise of discretion and judicial error, has ample opportunity to make erroneous decisions, from which the aggrieved party has no opportunity for relief. If a remedy should be afforded, it is for the legislature to provide, and not for the courts by changing the scope of the common-law writ of *certiorari*. *Ibid.*
3. A writ of *certiorari* should not issue to revoke the action of a common council when such action is so entirely beyond its jurisdiction as to be innocuous, and if issued should be dismissed upon the filing of the return. *State ex rel. Schaefer v. Schroff*, 98

CHANGE.
Of beneficiary. See INSURANCE, 14, 15.
Of grade. See MUNICIPAL CORPORATIONS, 4, 5.

CHARACTER. See ASSAULT AND BATTERY, 3–6. WITNESSES, 11.

CHATTEL MORTGAGES.

See PLEADING, 4.

1. Where a mortgagee of chattels has taken possession after default, the mortgagor has no longer any legal title to the property. He cannot maintain replevin therefor, nor, without proof of payment or other extinguishment of the debt, can he maintain an action against the mortgagee for conversion. His only remedy is by a bill in equity to redeem. *John O'Brien Lumber Co. v. Wilkinson,* 272

2. Even if a sale of mortgaged chattels be not made in strict conformity with the requirements of sec. 2316*a*, Stats. 1898, such sale does not operate as a cancellation of the mortgage debt in the sense that the mortgagor is entitled to recover the property, or its value, without regard to the amount remaining due on the mortgage. *Ibid.*

CLAIMS. See EXECUTORS AND ADMINISTRATORS, 4.

CLASSIFICATION. See INSURANCE, 16.

CLERKS OF COURTS.

Where a circuit court action is dismissed for want of prosecution, the clerk of that court is entitled to recover his fees for services necessary for entry of judgment from the party for whose benefit they were rendered; although the clerk omitted to exercise the right given him by sec. 748, Stats. 1898. *Williams v. Willock,* 292

CLOUD ON TITLE. See COMPROMISE AND SETTLEMENT, 1, 2. TAX TITLES, 5, 7.

COGNOVIT. See BILLS AND NOTES, 1, 3.

COLLATERAL AGREEMENTS. See BILLS AND NOTES, 4.

COLLATERAL ATTACK. See EXECUTORS AND ADMINISTRATORS, 6, 7. INTOXICATING LIQUORS, 4.

COLLATERAL PROMISE. See FRAUDS, STATUTE OF.

COLLATERAL SECURITY. See ESTOPPEL, 2.

COMBINATIONS. See MUNICIPAL CORPORATIONS, 8.

COMMISSIONS. See BROKERS.

COMMON COUNCIL. See CERTIORARI. INTOXICATING LIQUORS.

COMMON LAW. See ESCAPE, 1, 4. EVIDENCE, 17. TRUSTS AND TRUSTEES, 2.

COMPENSATION of officers. See CORPORATIONS, 8-10.

COMPENSATORY DAMAGES. See ASSAULT AND BATTERY, 6, 9. DEAD BODIES.

COMPETENCY. See EVIDENCE, 3-12. WITNESSES, 1-4.

COMPLAINT. See ACTION. BASTARDY, 1. CUSTOM, 4. DEAD BODIES. INDICTMENT AND INFORMATION. INSURANCE, 10. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 16. QUO WARRANTO, 1.

COMPOUNDING FELONY. See EXECUTORS AND ADMINISTRATORS, 4.

COMPROMISE AND SETTLEMENT.

See BASTARDY, 5, 7–10.

1. One, husband of plaintiff, and son of defendant, died, supposedly having devised his estate to them equally, but no will was found. The widow, after administering the estate as intestate, conveyed certain of the real estate to deceased's mother, and, as part of the same transaction, the mother executed a release to the widow "of any and all claims I may have against the estate of my said son and of my claims against" said widow. Thereafter a will was found, devising the estate one half to each, which was duly probated. In an action by the widow to remove such will as a cloud on her title obtained through such settlement, *held:*
   (1) The mother was estopped by her release.
   (2) The mother, having received the deed in consideration of relinquishing any claim to the balance of the estate, made a compromise of doubtful claims binding on her.
   (3) The release vested in the widow the equitable estate in the remaining lands entitling her to a decree in equity removing the cloud from her title. *Perkins v. Owen,* 238
2. In such case, parol evidence was admissible to show that the word "claims" in the release referred to the possible claims of the mother under the supposed will afterwards discovered. *Ibid.*
3. In an action by an infant for personal injuries, originally commenced against two defendants, one of the defendants paid a sum in settlement of the damages claimed by the father, with an understanding that the action should be dismissed as to that defendant, which was done. There was no release given by the plaintiff for the damages suffered by him, nor was any money paid or agreed to be paid him by or on behalf of such defendant for such a release. The dismissal was without prejudice, and there was nothing to prevent another action being begun. *Held,* that it was competent for the father to settle his own individual claim for damages on account of his son's disablement, and that fact did not affect the son's separate claim. *Nagle v. Hake,* 256
4. In an action on a due bill given in settlement of partnership accounts, the evidence, stated in the opinion, is *held* to sustain the claim that the settlement was based on a mutual mistake as to conceded liability. *Wheeler v. Seamans,* 573

CONCLUSIVENESS. See APPEAL, 9, 14, 16. JUDGMENTS, 2, 3.

CONCLUSIVE PRESUMPTION. See SALES, 7.

CONDITIONS PRECEDENT. See BASTARDY, 3, 7, 10. BILLS AND NOTES, 4, 5. INTOXICATING LIQUORS, 3. REPLEVIN. SALES, 4, 7, 8. TRESPASS.

CONSIDERATION. See BASTARDY, 1, 5, 9. COMPROMISE AND SETTLEMENT, 1. CONTRACTS, 5. EXECUTORS AND ADMINISTRATORS, 4. LIFE ESTATES, 1. VENDOR AND PURCHASER, 1.

CONSTITUTIONAL LAW. See CRIMINAL LAW, 5. MUNICIPAL CORPORATIONS, 5: TRIAL, 17–21.

CONTEMPORANEOUS AGREEMENT. See BILLS AND NOTES, 4, 5. CONTRACTS, 4.

CONTINUITY OF WORK. See MECHANICS' LIENS, 1–4.

CONTRACTS.

Requisites and validity. See FRAUDS, STATUTE OF. INSURANCE. MECHANICS' LIENS. SALES, 4, 5. SPECIFIC PERFORMANCE, 2. SUNDAY. TRIAL, 24.

Nature and essentials: Proposal and acceptance.

1. On the trial of the issues raised by a counterclaim, it was *held* that a finding of the trial court that the counterclaim was not supported by evidence was sustained by the record. *School District No. 9 v. School District No. 5,* 289

Same: Mutual mistake.

2. Mutual mistake, either of fact in making a contract or of law or fact in reducing the same to writing, is remediable, in the absence of a waiver of the right in that regard or estoppel to the assertion of it. *Rowell v. Smith,* 510

Construction and operation. See ADMIRALTY. BASTARDY. BILLS AND NOTES. BROKERS. CHATTEL MORTGAGES. COMPROMISE AND SETTLEMENT. CORPORATIONS. CUSTOM AND USAGE, 3–5. DESCENT AND DISTRIBUTION, 5. LANDLORD AND TENANT, 7. PLEADING, 3, 4. PRINCIPAL AND SURETY, 3. RAILROADS, 1, 4. SALES, 1–3, 6–11. SETOFF. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

3. In construction of contracts it is only when it is found impossible to give a meaning to one part consistent with any other that repugnancy exists, and the duty arises to choose as to which phrase shall exclude the other. *Chicago, M. & St. P. R. Co. v. H. W. Wright Lumber Co.* 46

Same: Contemporaneous agreements.

4. Under the rule that contemporaneous instruments relating to the same subject matter are to be construed together, construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. *Thorp v. Mindeman,* 149

Rescission and abandonment. See CONTRACTS, 5. SALES, 11. VENDOR AND PURCHASER, 1, 2.

5. In order to maintain an action at law to recover back the consideration of a contract, it is essential that before it be commenced the rescission shall have been complete as to both parties. *Phelps v. Mineral Springs Heights Co.* 253

Breach. See EQUITY, 1, 2. EVIDENCE, 3–7. SALES, 1–3.

CONTRIBUTION. See LIFE ESTATES, 2–5.

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 2. MASTER AND SERVANT, 5. NEGLIGENCE, 9–13. STREET RAILWAYS, 4–7.

CONVERSION. See CHATTEL MORTGAGES.

CONVEYANCES. See BOUNDARIES, 2. EQUITY, 1. LIFE ESTATES, 1. MORTGAGES. MUNICIPAL CORPORATIONS, 2. NAVIGABLE WATERS.

CORPORATIONS.

Promoters: Fraud: Liability. See APPEAL, 38, 39.

1. Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. They may retain their fiduciary relation thereto until its share of the capital shall have been taken and the corporation provided with a board of directors, or some reasonably efficient means of protecting itself. *Pietsch v. Milbrath,* 647
2. If one or more persons acquire property, intending to promote the organization of a corporation to purchase it from them at a profit to themselves and effect such purpose, limiting the membership to interested parties until the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders, they being kept in ignorance of the true nature of the transaction, and effecting such intent, the promoters are guilty of actionable fraud on the corporation and responsible to it for the gains made. *Ibid.*
3. In such circumstances, in the making of the contract between the corporation and its agents, it is mere fiction as to its prospective members by original subscription. *Ibid.*
4. In such case, since the corporation has no one to stand for it as an adverse party in the transaction, no meeting of adverse minds, essential to a binding contract, occurs. *Ibid.*
5. In such case, the corporation is deceived, in that advantage is taken of its incapacity to protect itself, as to the interests of prospective memberships by the original taking of its stock. *Ibid.*
6. Where promoters were concerned in a transaction of buying land at one price to turn it over to a corporation to be formed at a much greater price, and to induce others to come into the corporation in ignorance of the facts, such others contributing the actual capital necessary to fully accomplish the purpose of the promoters, the corporation, both before and after the adoption of the Code, had a remedy at law to enforce the liability of the promoters to refund to the corporation their profits. *Ibid.*
7. In such case, when it appeared that the cause of action accrued more than six and less than ten years before the action was commenced, the cause of action of the corporation is extinguished, as is also that of the stockholders to enforce such cause of action. *Ibid.*

Stockholders. See APPEAL, 38, 39. CORPORATIONS, 1–9.

Officers. See SETOFF, 3. TRIAL, 10, 24.

Same: Compensation of president.

8. The president of a corporation cannot maintain an action upon an implied contract to enforce a claim for services as an officer, when he is also a stockholder or director. *Lowe v. Ring,* 370
9. On an issue on a claim for compensation for the services of defendant as president of a corporation, it is *held* the state of the evidence left the case without proof of any express contract that defendant should receive a salary for his services as president. *Ibid.*

10. In such case, on a former trial, defendant had recovered on an express contract. On review of the evidence given on both trials it was *held* that there were material differences in the proofs bearing on that issue. *Ibid.*

Same: Authority to surrender lease.

11. The acts of the secretary and treasurer of plaintiff corporation, reviewed, and *held* that the extent of his authority as evidenced by these acts carried with it authority to effect a surrender of a lease as an act reasonably within the scope of his employment in conducting and managing plaintiff's business. *Commercial Hotel Co. v. Brill,* 638

Trust companies. See TRUSTS AND TRUSTEES, 3.

COSTS.

See EJECTMENT, 1.

1. In an action of ejectment, one of the defendants was properly joined with her husband by reason of her inchoate right of dower, and was also charged with personal liability for withholding the land from plaintiff. She answered by full disclaimer. *Held,* that since plaintiff was entitled in any event to recover against the wife as to her apparent dower, she was not, under sec. 2920, Stats. 1898, entitled to costs against plaintiff. *Stephenson v. Doolittle,* 36

2. The fact that the plaintiff has prosecuted his cause in good faith, is no good reason for making an exception to the general practice of awarding costs to the defendant, where in equity the defendant prevails as to the entire cause of action set forth in the complaint. *Pietsch v. Milbrath,* 647

COUNTERCLAIM. See APPEAL, 31, 35. PLEADING, 2–5. TAX TITLES, 7.

COUNTY COURTS. See EXECUTORS AND ADMINISTRATORS.

COUNTY TREASURER. See TAXATION, 16.

COURTS. See ADMIRALTY. EXECUTORS AND ADMINISTRATORS, 1–3.

COVENANTS. See BILLS AND NOTES, 4.

CRIMINAL LAW.

Nature and elements of crime. See ESCAPE.

1. To constitute an offense under sec. 4386, Stats. 1898, it is not necessary that the act be one which prevents the safe running of trains or endangers human life. *State v. Bisping,* 267

2. In order to constitute an offense under said sec. 4386, it is not necessary that the obstruction be placed on the track, or that any of the prohibited acts be committed for the purpose of unlawfully, maliciously, and wantonly destroying such railroad. *Ibid.*

3. The classification of said sec. 4386, by placing it in the chapter of "offenses against the lives and persons of individuals," does not evince a legislative intent that the element of danger to human life must inhere in any of the acts to make them criminal. *Ibid.*

4. The construction of said sec. 4386, above given, does not make the offense a malicious trespass, and therefore said section is not out of harmony and in conflict with secs. 4440, 4440*a*, Stats. 1898, relating to malicious injury to railroad property. *Ibid.*

5. Under sec. 4386, Stats. 1898, in view of the serious consequences which may flow from the inhibited acts, there is nothing excessive or unusual in the punishment provided, and hence it cannot be said that the statute contemplates that the acts constituting the offense include only such as are necessarily dangerous to human life. *Ibid.*

Pleading. See INDICTMENT AND INFORMATION.

Judgment and sentence. See ESCAPE, 1–3.

CROSS-COMPLAINT. See PLEADING, 2.

CROSS-EXAMINATION. See APPEAL, 26. ASSAULT AND BATTERY, 1. NEGLIGENCE, 3, 7. TAXATION, 15. WITNESSES, 6–9, 11.

CULVERTS. See MUNICIPAL CORPORATIONS, 6, 7.

CUSTOM AND USAGE.

See EVIDENCE, 7. PLEADING, 3. NEGLIGENCE, 7. SALES, 6.

1. A witness must show that he knows about a general trade custom before he can be heard to testify in regard to it, and, in the absence of such showing, it is not error to sustain objections to questions calling for statements as to what is such custom. *Nagle v. Hake,* 256

2. Testimony directed to the individual custom of a witness is incompetent. *Ibid.*

3. Particular usages and customs of trade or business must be known by the party to be affected by them, or they will not be binding, unless they are so notorious, universal, and well established that his knowledge of them will be conclusively presumed. *John O'Brien Lumber Co. v. Wilkinson,* 272

4. A general usage and custom need not be pleaded, since courts take judicial notice thereof, and such general usage and custom is presumed to have entered into a contract affected by it and to bind the parties. *Ibid.*

5. Evidence of a general usage and custom is allowed, not only to explain, but also to add tacitly implied incidents to the contract actually made in addition to those which are actually expressed. It has, however, very remote, if any, bearing in establishing a different contract, which, if made, through mistake was never reduced to writing. *Ibid.*

DAMAGES.

Nature and grounds. See MECHANICS' LIENS, 10. MUNICIPAL CORPORATIONS, 4, 5, 8. NAVIGABLE WATERS, 2. SALES, 1–5.

Nominal damages. See DEAD BODIES.

Compensatory damages. See ASSAULT AND BATTERY, 6–9. DEAD BODIES.

Exemplary damages. See ASSAULT AND BATTERY, 7, 8.

Measure of damages: Breach of contract. See APPEAL, 36. INSURANCE, 12. MECHANICS' LIENS, 11. MUNICIPAL CORPORATIONS, 6, 7. NAVIGABLE WATERS, 2. SALES, 5.

1. The vendee's general damages for breach of the contract by delivery of potatoes which were not such as the contract called for are limited to the difference between the market value of those delivered, at the time and place of delivery, and the value they would have possessed had they been according to contract; and a special verdict which fails to find such market value of those delivered or such difference is fatally defective. *Northern Supply Co. v. Wangard,* 1

2. A finding of the jury charging the vendor with the entire responsibility for the destruction of the potatoes sold and also of other potatoes with which they were placed in the vendee's cellar, is *held* inconsistent with the undisputed evidence that after the vendee had discovered the rotting condition of the new potatoes he made no attempt to remove them or to save the old ones, except as a few were picked out from time to time for his retail trade, until the entire lot became a decayed and worthless mass. *Ibid.*

3. The vendor is not chargeable in such a case with any loss which the vendee could by the exercise of ordinary care have prevented. *Ibid.*

4. The vendee, as soon as he discovered that the new potatoes were rapidly decaying, should have removed them from the cellar and saved the old potatoes, and might recover the reasonable cost of so doing; but he was not entitled to recover the cost of sorting over a few occasionally for his retail trade and of removing the rotten mass that remained. *Ibid.*

Same: Excessive damages. See ASSAULT AND BATTERY, 9. TRIAL, 17–21.

5. Under the facts, stated in the opinion, a verdict for more than $5,000 damages is *held* excessive. *Rueping v. C. & N. W. R. Co.* 319

DEAD BODIES.

A complaint alleged that plaintiff was the son and heir of his mother, who died in a hospital; that he was by her, before her death, instructed and requested to take charge of her body for purposes of burial, and was the only person interested; that he did so, removing the body to his place of residence, and proceeding to have the same prepared for burial; that defendant requested permission to merely examine the stomach of said body, which request being granted, he wilfully, maliciously and fraudulently, without authority, and against the wish of plaintiff, and without any authority at law, and trespassing upon the rights of the plaintiff as custodian of said body and as son and heir, cut out, removed, and carried away the stomach of said dead body, whereby burial became necessary without it, and that thereby the rights of the plaintiff had been recklessly and wilfully trespassed upon, and his feelings greatly injured, so that he has suffered both in mind and body, to his damage, etc. Defendant demurred to the complaint for defect of parties, and failure to state facts sufficient to constitute a cause of action. *Held:*

(1) The complaint stated a clear legal right, and an unlawful and wilful violation thereof, from which the law implied

at least nominal damages, for which, upon fundamental principles of the common law, a right of action existed.

(2) The sense of outrage and the mental suffering to plaintiff, resulting directly from the wilful act charged upon the defendant, were proper independent elements of compensatory damages.

(3) The allegations that plaintiff was the son of the deceased (obviously adult), and that he was the only person having any interest, are sufficient on demurrer to exclude the existence of any surviving husband, or any other child having equal right or duty to supply proper burial to his mother's remains, and that the right of custody and burial, and the resulting right of action for violation thereof, were in the plaintiff. *Koerber v. Patek*, 453

DEBTOR AND CREDITOR. See BASTARDY. BILLS AND NOTES. BROKERS. CHATTEL MORTGAGES, 1. COMPROMISE AND SETTLEMENT. CONTRACTS. DAMAGES. ELECTION OF REMEDIES. FRAUD. FRAUDS, STATUTE OF. GARNISHMENT. INSURANCE, 1–13, 17, 18. JUDGMENTS, 1. LIENS. LIFE ESTATES, 2–5. LIMITATION OF ACTIONS. MECHANICS' LIENS. MORTGAGES. PRINCIPAL AND SURETY. SALES. SETOFF. TRIAL, 9.

DECLARATIONS. See DESCENT AND DISTRIBUTION, 4. EVIDENCE, 10. HIGHWAYS, 5.

DEDICATION. See HIGHWAYS, 1. MUNICIPAL CORPORATIONS, 2.

DEEDS. See BOUNDARIES, 2. EQUITY, 1. LIFE ESTATES, 1. MORTGAGES, 1. MUNICIPAL CORPORATIONS, 2. NAVIGABLE WATERS. TAX TITLES.

DEFAULT. See JUDGMENTS, 1.

DEFECT OF PARTIES. See BASTARDY, 2, 4.

DEFICIENCY. See MORTGAGES, 7.

DELAY. See EQUITY, 3. MECHANICS' LIENS, 3, 4.

DELINQUENT TAXES. See TAXATION, 18.

DELIVERY. See SALES, 4, 5.

DEMURRER. See APPEAL, 35. BASTARDY, 1. DEAD BODIES. QUO WARRANTO.

DEPOSITS. See PRINCIPAL AND SURETY, 1, 2.

DESCENT AND DISTRIBUTION.

See WILLS, 1, 2.

Persons entitled: Child adopted after execution of will.

1. Under secs. 2286, 4024, Stats. 1898, the rights under a will of a child legally adopted, are equivalent to those of a child born in wedlock. *Sandon v. Sandon*, 603

2. E., nine days after the execution of a will, was legally adopted by the testator. The will was plain and unambiguous, and distributed the entire estate of the testator to certain beneficiaries, making no mention of the child subsequently adopted. *Held*, that as it could not be said that it was "apparent *from the will* that it was the intention of the testator that no provision should be made for" E., she was entitled to the same share of the estate as if the testator had died intestate. *Ibid.*

3. In such case, extrinsic evidence may be received to aid in determining whether any doubtful language in the will shows an intention to make no provision for such adopted child, but it cannot be received to add such intention to the will. *Ibid.*

4. In such case, declarations of testator concerning the making of a will and as to his intention concerning the adopted child's relation to his estate, are inadmissible. *Ibid.*

Advancements.

5. Plaintiff filed as a claim against his son's estate, a plain, unambiguous promissory note. The answer alleged that at the time of the pretended execution of the note the plaintiff gave his deceased son the face of the note as an advancement, and that the note was only evidence of such gift or advancement. *Held*, that parol evidence tending to prove the allegations of the answer was inadmissible, both under sec. 3959, Stats. 1898, and also because it tended to contradict the plain terms of an unambiguous written contract. *Schmidt v. Schmidt's Estate*, 295

DILIGENCE. See DAMAGES, 1–4. EVIDENCE, 3. SALES, 3.

DIRECTING VERDICT. See APPEAL, 8, 10. MASTER AND SERVANT, 1, 3, 5.

DISCHARGE of policeman. See MUNICIPAL CORPORATIONS, 1.

DISCLAIMER. See EJECTMENT, 1, 2.

DISCRETION. See EVIDENCE, 19. MORTGAGES, 9. NEW TRIAL, 2. PLEADING, 3, 4. TRIAL, 27, 28. TRUSTS AND TRUSTEES. WITNESSES, 8.

DOCUMENTS. See EVIDENCE, 17–20.

DOWER.

See PARTITION. WILLS, 1.

An unassigned dower right is not an estate in lands. *Ullrich v. Ullrich*, 176

DUE-BILLS. See COMPROMISE AND SETTLEMENT, 4.

DUPLICITY. See TRIAL, 24.

DURESS. See EXECUTORS AND ADMINISTRATORS, 4.

EJECTMENT.

See ADVERSE POSSESSION. APPEAL, 27. COSTS, 1.

1. Plaintiff, subsequent to the passage of ch. 152, Laws of 1901, amending secs. 3075, 3088, Stats. 1898, brought an action of ejectment against D. and wife. The lands were vacant and unoccupied, D.'s title being a tax deed, void because of certain irregularities. D. answered by a full disclaimer of any interest, except such as existed by virtue of certain tax certificates which he owned; denied the allegations as to retention of possession from plaintiff; alleged that prior to the commencement of the action he had obtained a tax deed of the premises; that thereafter and before the commencement of the action he had conveyed to another, and admitted plaintiff's ownership and possession. D.'s wife, answering separately, admitted the allegations of the complaint, disclaimed any right to the property and denied being a party to a retention thereof from the plaintiff. Both answers were stricken out as frivolous. *Held*, that while before the enactment of ch. 152 an action in ejectment could not be maintained against a person circumstanced as D., it could

be under that statute, and hence that D. could not, by a mere disclaimer, put plaintiff in the wrong and obtain a judgment for costs against him. *Stephenson v. Doolittle*, 36

2. In such case, D.'s wife being also charged with personal liability for withholding the land from plaintiff, plaintiff was not warranted in charging her under ch. 152, Laws of 1901, she having no apparent record title, and therefore her answer disclaiming title was a complete defense to the cause of action against her charging personal liability. *Ibid.*

3. In such case, it was error to strike out D.'s answer as frivolous. An answer is not frivolous merely because it admits the claim of the plaintiff, or, in addition to admissions, pleads the existence of facts showing that defendant is entitled to statutory protection accorded one in his situation. *Ibid.*

4. In such case, plaintiff having established his cause of action by evidence against D. and his wife, so far as she was merely charged as such, D. was not prejudiced by striking out his answer as frivolous. *Ibid.*

5. In such case, evidence as to the conveyance of the tax title before the action was commenced, and that no notice of *lis pendens* had been filed, is immaterial. *Ibid.*

6. In such case, the striking out of D.'s answer did not preclude him from making proof of the amount of expenditures (tax certificates, tax-deed fees, recording, etc.), based upon his tax deed. *Ibid.*

7. Where, in ejectment, the plaintiff is entitled to recover by reason of an invalid tax deed, the proceedings to establish defendant's expenditures, based on his tax deed, under sec. 3087, Stats. 1898, are not a part of the trial of the issues tendered by the complaint, but should take place after the preliminary question of whether plaintiff is entitled to recover, subject thereto, shall have been determined. *Ibid.*

ELECTION in pleading. See ACTION, 1.

ELECTION OF REMEDIES.

See ACTION, 1. NEGLIGENCE, 16. SALES, 11.

1. The doctrine of election of remedies applies only where there are two or more appropriate ways to vindicate the right of a controversy, but the relations between the parties necessary to the pursuit of one successfully, are such that concurrent existence of those necessary to the pursuit of the other or others is impossible. *Rowell v. Smith*, 510

2. Unsuccessful use of a remedy, supposed to be, but in effect not, appropriate to vindicate the right of a particular matter, either because the facts turn out to be different than plaintiff supposed them to be, or the law applicable to the facts is found to be different than supposed, though the first action proceeds to judgment, does not preclude plaintiff from thereafter invoking the proper remedy. *Ibid.*

3. Neither the doctrine of election nor *res adjudicata* applies to the situation suggested in the preceding paragraph, though if the second remedy invoked is in equity and the defendant would be seriously prejudiced by plaintiff's mistake if he were per-

mitted to proceed the second time, the court might apply principles of estoppel *in pais* if deemed necessary to prevent injustice. *Ibid.*

4. Where more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one with knowledge, or reasonable means of knowledge, of the facts, the other no longer exists. *Ibid.*

5. Where more than one remedy to deal with a single subject of action exists and they are not inconsistent all may be used concurrently, but a satisfaction in one is a satisfaction in all. *Ibid.*

6. Where only one remedy exists to deal with a single subject-matter, but through mistake one not appropriate is invoked, the proper remedy is not thereby waived. *Ibid.*

ELECTIONS. See EVIDENCE, 1, 2, 8–10, 15, 16. QUO WARRANTO. WITNESSES, 9.

ELECTRICITY. See INSURANCE, 11. NEGLIGENCE, 2–7.

ENTIRE CONTRACTS. See SALES, 4, 5.

EQUITY.

Jurisdiction. See CHATTEL MORTGAGES, 1. COMPROMISE AND SETTLEMENT, 1, 2, 4. CONTRACTS, 2. FRAUDS, STATUTE OF. HIGHWAYS, 1. INSURANCE, 17. MAXIMS. SPECIFIC PERFORMANCE, 4. TAX TITLES, 7. VENDOR AND PURCHASER, 3–7.

Same: Adequate remedy at law.

1. Under circumstances, stated in the opinion, excusing plaintiff's failure to examine the deed before accepting it, he is *held* not inexcusably negligent in that regard, precluding any successful appeal on his part to the courts for redress. *Loyd v. Phillips,* 627

2. Such facts do not show a mere breach of contract, for the redress of which legal remedies are amply sufficient, but show a situation where equity jurisdiction should lend its aid in the matter. *Ibid.*

Laches and stale demand.

3. Mere delay for any length of time, short of a period sufficient to extinguish the right under the statute of limitations, does not bar an action in equity to vindicate such right. *Rowell v. Smith,* 510

ESCAPE.

1. By the common law a prisoner escaping from custody, while serving a sentence for a criminal offense, is liable to recapture and reconfinement to serve out his sentence, the term of his voluntary absence not being counted in his favor. *In re McCauley,* 31

2. In such case, judicial direction, other than that contained in the original judgment, is unnecessary. *Ibid.*

3. In such case, for the offense of escape, or prison breach and escape, a trial and sentence is necessary in order to punish the offender, the same as in the case of other offenses. *Ibid.*

4. Secs. 4490 and 4494, Stats. 1898, and ch. 75, Laws of 1901, are declaratory of the common law. *Ibid.*

ESTATES. See DOWER. LIFE ESTATES. PARTITION.

ESTATES OF DECEDENTS. See COMPROMISE AND SETTLEMENT, 1, 2. DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. MORTGAGES, 8.

ESTOPPEL.

See BILLS AND NOTES, 9, 11. COMPROMISE AND SETTLEMENT, 1. CONTRACTS, 2. ELECTION OF REMEDIES. MECHANICS' LIENS, 3.

1. Estoppel arises only when a person may reasonably anticipate a change of position by another in reliance on the former's act, and the former is not required to anticipate negligence or ignorance of the law in others. *Loizeaux v. Fremder*, 193
2. Plaintiff took, as collateral, from a corporation of which defendant's son was president, a note of defendant which failed to name any one as payee. There was no express representation of authority to use the note as collateral, and plaintiff, when he took the note, failed to observe the absence of any payee's name, and did not require the person from whom he obtained the note to endorse it. *Held*, that plaintiff was precluded from any right to invoke estoppel. *Smith v. Willing*, 377

EVIDENCE.

Judicial notice. See CUSTOM AND USAGE, 4.

Presumptions. See BOUNDARIES, 2. CUSTOM AND USAGE, 3, 4. EVIDENCE, 20. NEGLIGENCE, 3. PRINCIPAL AND AGENT, 1. SALES, 7. TAXATION, 3.

1. When one has been declared elected by the board of canvassers of the election, and is holding the office under such determination, a presumption is created that he received the number of votes stated in the certificate, and casts on his opponent the burden of showing that the certificate is false. *State ex rel. Leonard v. Rosenthal*, 442
2. In such case, when such presumption is rebutted by competent evidence, it then devolves upon the one holding the office to establish the fact that he received the greater number of votes by other evidence, in order to prevent judgment of ouster. *Ibid.*

Burden of proof. See ASSAULT AND BATTERY, 11, 12. EVIDENCE, 1. SIGNATURES, 1. TRIAL, 11.

Relevancy, materiality and competency. See ASSAULT AND BATTERY, 2–4. COMPROMISE AND SETTLEMENT, 2. CUSTOM AND USAGE, 5. DESCENT AND DISTRIBUTION, 4. EJECTMENT, 5. HIGHWAYS, 3, 5. MECHANICS' LIENS, 8, 9. NEGLIGENCE, 3–7, 17. SALES, 9, 10. STREET RAILWAYS, 5, 6. SUNDAY, 2. TRIAL, 25–27.

3. Evidence as to the best method of handling potatoes found to be rapidly decaying is *held* not immaterial, but to have had a bearing upon the question whether the vendee had exercised ordinary care to prevent loss. *Northern Supply Co. v. Wangard*, 1
4. The question whether the potatoes when delivered by the vendor at the agreed place were of good, sound, white stock was a proper one for opinion evidence, but under the written contract in this case, calling only for "good" potatoes, was immaterial. *Ibid.*

5. So, also, under a contract, the question as to what kind of soil the potatoes were grown in was immaterial. *Ibid.*

6. Where a witness has testified that he did not know whether W., one of defendants, knew he had a certain contract or not, it is not error to exclude a question as to whether witness had any reason to believe that one G. had spoken to W. about that contract. Such testimony is at most conjectural. *John O'Brien Lumber Co. v. Wilkinson,* 272

7. While evidence of previous independent transactions is inadmissible unless it tends to prove motive, intent, or custom, yet where it appears that in making a contract, reference was distinctly made to a previous transaction of a similar character, and that it was then agreed that plaintiff might deliver grain, and take the price later on, as was done on the former occasion, the terms of the former transaction are, in effect, imported into the bargain, and evidence as to its terms is made competent. *Sullivan v. Mauston Milling Co.* 360

8. Where two names appeared on the poll list of an election as Frank Bersche and George Long, it is not error to admit evidence that they were non-residents, where it was alleged in the complaint that two of the votes claimed to be illegal were cast by Frank Bierse and George Lang. *State ex rel. Leonard v. Rosenthal,* 422

9. The non-residence of one in a particular town, village, or city cannot be proved by testimony that a person of the same name was found to be included in the directory of a nearby populous city. *Ibid.*

10. The voluntary declarations of a voter who voted at an election, that he was not a resident of the voting precinct at that time, are admissible. *Ibid.*

Same: Experiments.

11. Testimony of experiments is competent if the conditions be sufficiently similar, so that the facts attending the experiment will fairly illustrate the point in issue. *Zimmer v. Fox River Valley E. R. Co.* 643

12. When evidence of experiments is offered, it devolves upon the court, before receiving it, to determine, upon a proper showing, whether the conditions existing on the two occasions are *prima facie* essentially the same. *Ibid.*

Same: Res gestæ. See EVIDENCE, 14. HIGHWAYS, 5.

Admissions. See HIGHWAYS, 5.

13. Where there was evidence tending to prove admissions by both plaintiff and defendant, and plaintiff admitted making only part of the alleged admissions, a general instruction on the subject of admissions, stated in the opinion, is *held* not to have misled the jury as to the admission which plaintiff acknowledged he made. *Sullivan v. Mauston Milling Co.* 360

14. Declarations of a public officer cannot be given in evidence as admissions to bind the municipality of which he is the agent, unless they are part of the *res gestæ. Garske v. Ridgeville,* 503

Declarations. See DESCENT AND DISTRIBUTION, 4. EVIDENCE, 10. HIGHWAYS, 5.

Hearsay.

15. In an action of *quo warranto* to test title to the office of assessor of a village, witnesses who did not live in the village at the time of the election, but went into the village some weeks afterwards, testified that they then made systematic inquiries at various manufacturing establishments and boarding houses in the village, as well as of residents of the village, as to whether certain alleged illegal voters were known to reside in the village on election day. These witnesses were then allowed to testify, against objection and exception, that, from such investigation, they were not able to find that such voters resided in the village on election day. *Held*, that the great practical difficulty of proving non-residence did not justify the admission of such evidence in violation of the rule excluding hearsay evidence. *State ex rel. Leonard v. Rosenthal*, 442

16. In such case, in order to qualify the witness to testify as to the residence in the district of one alleged to be an illegal voter, it is not absolutely necessary that the witness should have actually resided in the election district at the time of the election, but he should show that, at the time, he was to some substantial extent acquainted with the inhabitants of the district. *Ibid.*

Public records: Certificates.

17. At common law the fact that a specific document or entry did not exist in public records might be proven by the testimony of the custodian or of any one who had made a search of the records for that purpose, and such rule is not changed by sec. 4163, Stats. 1898 (providing for official certificate that a document, etc., cannot be found). *State ex rel. Leonard v. Rosenthal*, 442

Production of documentary evidence.

18. In an action of replevin defendant procured an order under sec. 4183, Stats. 1898, requiring plaintiff to deposit certain documents with the clerk of the court. Under the facts, stated in the opinion, it was *held* that the defendant was not in a position to insist upon the production of the documents, and in default thereof that plaintiff be punished. *Roberts v. Francis*, 78

19. In such case, under the facts stated in the opinion, there was no abuse of discretion in the refusal of the court to enforce such order. *Ibid.*

20. The failure of the plaintiff to produce certain documents, is *held*, under the circumstances stated in the opinion, not to raise a presumption that the documents would furnish proof against the claims of plaintiff. *Ibid.*

Parol evidence. See COMPROMISE AND SETTLEMENT, 2. DESCENT AND DISTRIBUTION, 3, 5. INSURANCE, 8.

Opinion evidence. See EVIDENCE, 4.

Weight and sufficiency. See ADVERSE POSSESSION, 1, 3, 4. APPEAL, 23, 25. BOUNDARIES, 2. BROKERS, 2. COMPROMISE AND SETTLEMENT, 4. CONTRACTS, 1. DESCENT AND DISTRIBUTION, 2–5. EXECUTORS AND ADMINISTRATORS, 4. FRAUD. HIGHWAYS, 1, 2, 4, 5. INSURANCE, 4. MASTER AND SERVANT, 1–3, 5. MECHANICS' LIENS, 1, 5. MORTGAGES, 2, 9. NEGLIGENCE, 1–15, 17. RAILROADS, 4. SETOFF. SIGNATURES, 2. TAXATION, 8–14, 16, 17. TRIAL, 12. VENDOR AND PURCHASER, 2. WITNESSES, 1.

EXCEPTIONS. See APPEAL, 3–9.

EXCESSIVE DAMAGES. See DAMAGES.

EXECUTORS AND ADMINISTRATORS.

See COMPROMISE AND SETTLEMENT, 1, 2. DESCENT AND DISTRIBUTION. MORTGAGES, 8. WILLS. WITNESSES, 2.

Jurisdiction of county courts: Letters of administration: Subsequent discovery of will.

1. The jurisdiction of the county court over the settlement of the estate of one who at the time of his death was an inhabitant or resident of the county over which such court exercises jurisdiction, does not depend upon the presence or absence of a will. *Perkins v. Owen,* 238
2. Where letters of administration are issued on the mistaken idea that no will was left, and a will be afterward found and proved, such letters and all acts of the county court inconsistent with the due administration of the estate under the terms of the will may be revoked; but such action is not taken because the prior proceedings are void for lack of jurisdiction to administer the estate as intestate, but on the ground that they have been erroneous. *Ibid.*
3. In such case, in the absence of some controlling intervening fact, the county court should set aside the administration proceedings, unless rights thereunder have become confirmed by virtue of the statute of limitations. *Ibid.*

Allowance of claims.

4. In an action on a claim filed against a decedent's estate the evidence, stated in the opinion, is *held* to fail to establish fraud or duress, or that consideration for the claim was the compounding of a felony. *Currie v. Michie,* 120

Accounting and settlement: Liability on administration bonds.

5. Under sec. 2443, Stats. 1898, county courts have jurisdiction to determine the amount justly allowable to the attorneys of the administrator out of the estate on account of legal services performed by them, to make the same a lien on the assets thereof, and to order the lien extinguished by using funds for which the administrator is responsible. *Carpenter v. U. S. Fidelity & Guaranty Co.* 209
6. The court having exercised its jurisdiction in the respect last noted, its decision cannot be disturbed in an action against the sureties on the bond of a defaulting administrator. *Ibid.*
7. Where an administrator's account has been duly settled, including an adjudication of the amount due his attorneys for services and disbursements, and final order entered requiring the payment direct to the attorneys of the sum so awarded them, such final order is conclusive in an action brought in the name of the county judge upon the administrator's bond against the sureties. *Ibid.*

EXEMPLARY DAMAGES. See ASSAULT AND BATTERY, 7, 8.

EXEMPTIONS. See TAXATION, 1–3.

EXPERIMENTS. See EVIDENCE, 11, 12.

EXPRESS AUTHORITY. See INSURANCE, 4, 7.

EXPRESS CONTRACT. See CORPORATIONS, 9, 10. TRIAL, 24.

EXPRESS WARRANTY. See SALES, 9, 10.

FARM CROSSINGS. See RAILROADS, 2–5.

FEES. See CLERKS OF COURTS.

FELLOW-SERVANT. See MASTER AND SERVANT, 4.

FENCES. See TRESPASS.

FINDINGS. See APPEAL, 13–16, 23, 25, 28. TRIAL, 29, 30.

FIRES. See INSURANCE, 1–13. RAILROADS, 6. TRIAL, 6.

FORECLOSURE. See APPEAL, 2. BILLS AND NOTES, 4–11. LIENS, 1–3. LIFE ESTATES. MECHANICS' LIENS. MORTGAGES, 2–9. SIGNATURES. VENDOR AND PURCHASER, 6, 7.

FORFEITURE. See INSURANCE, 17.

FORGERY. See SIGNATURES.

FORMER ADJUDICATION. See APPEAL, 35–40. CORPORATIONS, 10. ELECTION OF REMEDIES. JUDGMENTS, 2, 3. MECHANICS' LIENS, 10. MORTGAGES, 8. TAXATION, 1.

FRAUD.

See CORPORATIONS, 2–6. EXECUTORS AND ADMINISTRATORS, 4. FRAUDS, STATUTE OF. INTOXICATING LIQUORS, 3. LIMITATION OF ACTIONS.

1. To set aside a written instrument on the ground of fraud, the evidence of the fraud must be clear and satisfactory. *First National Bank v. Buetow,* 285
2. In an action on a written guaranty alleged to have been obtained by fraud, upon the evidence, stated in the opinion, the findings of the trial court upon the issue of fraud are *held* not to be against the clear preponderance of the evidence. *Ibid.*

FRAUDS, STATUTE OF.

See LANDLORD AND TENANT, 2. SPECIFIC PERFORMANCE, 4.

1. A cause of action to enforce a supposed valid agreement to answer for the debt, default or miscarriage of another is different from one based on the circumstance resulting in the supposed valid agreement to compel specific performance of a verbal agreement to make a valid guaranty or to reform one defectively written so as to make the same accord with the intention of the parties. *Rowell v. Smith,* 510
2. A verbal agreement to make a collateral promise can no more be dealt with in equity to save the collateral promisee from the consequences of noncompliance with the statute of frauds, than a written agreement in that regard, which is fatally defective for noncompliance with such statute. *Ibid.*
3. A mere collateral promise to answer for the debt, default or miscarriage of another, invalid because not reduced to writing, or because defectively so reduced, is not susceptible of part performance as between the principal contracting parties so as to afford the collateral promisee a right of action in equity to compel the making of a valid guaranty in writing, to reform the one defectively made. *Ibid.*
4. The doctrine that in case a contract, required to be made in a particular way to be valid under the statute of frauds, is not so made, a court of equity will deem the statute "uplifted" and enforce the obligations growing out of the circumstances of the

situation so as to prevent the consequences that would otherwise flow from such statute, where, if that were not done, it would be used as an instrument of fraud instead of one to prevent fraud, does not apply if the effect would be to essentially nullify the statute. *Ibid.*

5. The doctrine as to part performance taking a transaction out of the statute of frauds so that the relations between the parties may be dealt with judicially to prevent injustice, is grounded on the idea that the opposite party by the statute and such part performance has obtained title to something of value for which, independently of the statute, he should render an equivalent. *Ibid.*

6. The doctrine mentioned in the last paragraph cannot apply as between the parties to a mere collateral promise which is within the statute of frauds, because as to such neither part nor full performance by the collateral promisee enriches the collateral promisor. *Ibid.*

FRIVOLOUS PLEADINGS. See EJECTMENT, 1, 3, 4.

GARNISHMENT.

Persons and property subject to garnishment.

1. A corporation, being indebted to a large number of persons, delivered to F., who happened to be its secretary, its check, for $5,000, accompanied by a communication addressed to F., as follows: "Pursuant to authority duly conferred by the board of stockholders, as well as the board of directors, there is hereby assigned to you in trust for the several parties and creditors mentioned in the annexed schedule, the aggregate sum of $5,000, to be distributed and paid forthwith to the several parties named in detail statement." There was annexed a list of creditors, specifying against each the amount of his entire debt, and the amount to be paid to him out of the $5,000. F. deposited the money in his own bank account, and drew checks payable to each creditor named for their respective amounts. Plaintiff, who was one of the creditors named in the list, and who had not received its dividend, commenced action against the corporation, and garnished F. *Held*, that upon no theory as to the relations arising from the transfer of said $5,000 to F., was the money subject to garnishment. *Gilbert Paper Co. v. Whiting Paper Co.* 472

2. It is competent for the principal defendant to appeal from a judgment against a garnishee. *Badger Lumber Co. v. Stern*, 618

3. A debt due jointly to the principal defendant and another cannot be reached by garnishment in an action against such defendant alone. *Ibid.*

4. Such rule applies to an indebtedness owing by the garnishee to a husband and wife. *Ibid.*

5. The answer of a garnishee alleged that he "was indebted to the defendant S.," but that was immediately followed by the allegation that "such indebtedness" was upon a written contract, wherein and whereby he "agreed to pay said S. and Anna S. (his wife) the sum," etc. *Held*, that such statement of fact superseded the general conclusion of indebtedness to S., and it was error to enter judgment thereon against the garnishee. *Ibid.*

GENERAL DENIAL. See MECHANICS' LIENS, 9.

GROSS NEGLIGENCE. See ACTION. NEGLIGENCE, 14–17.

GUARANTY. See FRAUD, 1, 3. FRAUDS, STATUTE OF, 1, 3. PRINCIPAL AND SURETY. SPECIFIC PERFORMANCE.

HEARSAY. See EVIDENCE, 9, 15, 16.

HIGHWAYS.

Dedication: Obstructions. See MUNICIPAL CORPORATIONS, 2.

1. In an action in equity to compel the removal of obstructions from an alleged highway, and to enjoin future obstruction thereof, the evidence, stated in the opinion, is *held* to negative the claim that the use of the *locus in quo* was so extensive or long continued as to demonstrate acceptance by the public of an offered dedication. *McKenzie v. Haines,* 557

Improvement. See MUNICIPAL CORPORATIONS, 3–5.

Injuries from defects or obstructions. See MUNICIPAL CORPORATIONS, 6–9. TRIAL, 14.

2. In an action for injuries from a defect in a highway, under the evidence, stated in the opinion, it is *held* that a situation was presented which warranted the jury in acquitting plaintiff of contributory negligence. *Lynch v. Waldwick,* 351

3. In an action for personal injuries received on a highway, it is not error to exclude testimony tending to prove that other persons drove their teams over the place in question about the same time without having any trouble. *Garske v. Ridgeville,* 503

Same: Notice: Service.

4. In an action for personal injuries received on a defective highway, the notice of injury required by sec. 1339, Stats. 1898, as testified to by the draftsman, in connection with evidence of the knowledge of the highway officers as to the *locus in quo,* stated in the opinion, is *held* to be sufficient. *Garske v. Ridgeville,* 503

5. Where the evidence as to the service of the notice of injury required by sec. 1339, Stats. 1898, was testimony tending to show declarations by the town chairman, made more than a month after the injury, that he had received such notice, they are not part of the *res gestæ,* and incompetent to prove such service. *Ibid.*

HOMESTEAD. See PARTITION, 1. WILLS, 1.

HUSBAND AND WIFE. See BASTARDY, 9. GARNISHMENT, 4, 5. INSURANCE, 14, 15. MORTGAGES, 7, 8. WITNESSES, 2.

IDEM SONANS. See EVIDENCE, 8.

IMPEACHMENT.
Of assessment. See TAXATION, 5–17.
Of verdict. See TRIAL, 25–27.
Of witnesses. See APPEAL, 32. WITNESSES, 10, 11.

IMPLIED AUTHORITY. See BILLS AND NOTES, 1, 2. INSURANCE, 4.

IMPLIED CONTRACTS. See CORPORATIONS, 8–10. INSURANCE, 10. TRIAL, 24.

IMPLIED WARRANTY. See SALES, 1.

IMPROVEMENTS. See LIFE ESTATES, 5. VENDOR AND PURCHASER, 3–7.

IMPUTED NEGLIGENCE. See NEGLIGENCE, 13.

INCOME. See LIFE ESTATES, 5. TRUSTS AND TRUSTEES, 5. WILLS, 3-5.

INDEMNITY. See INSURANCE, 5-10.

INDICTMENT AND INFORMATION.

An information set out the acts charged in words of substantially the same meaning of those used in sec. 4386, Stats. 1898, but added the allegation: "For the purpose of then and there unlawfully, maliciously, and wantonly destroying such railroad." *Held*, that the language of the information charged and informed defendant fully of every fact essential to establish the offense without the quoted allegation, which was surplusage, and its insertion in no way misled or prejudiced the defendant. *State v. Bisping*, 267

INDIVIDUAL CUSTOM. See CUSTOM AND USAGE, 2, 3.

INDORSEMENT. See BILLS AND NOTES, 1, 7, 8. ESTOPPEL, 2.

INFANTS. See COMPROMISE AND SETTLEMENT, 3. MASTER AND SERVANT, 2, 3. NEGLIGENCE, 2-6. TAX TITLES, 1, 3.

INFORMATION. See INDICTMENT AND INFORMATION.

INHABITANCY. See EVIDENCE, 8-10, 15, 16. EXECUTORS AND ADMINISTRATORS, 1.

INJUNCTION. See HIGHWAYS, 1. MUNICIPAL CORPORATIONS, 3.

INSTRUCTIONS TO JURY. See APPEAL, 4, 5, 24, 34. ASSAULT AND BATTERY, 5-7, 10, 11. EVIDENCE, 13. NEGLIGENCE, 13. SALES, 7. STREET RAILWAYS, 7. TRIAL, 1-16.

INSURABLE INTEREST. See INSURANCE, 5-10.

INSURANCE.

FIRE.

Agents and brokers.

1. An insurance agent may be the agent of the assured in procuring insurance, but, when a conflict of duties arises, his authority to act for the assured must yield to his duty as agent for the insurance company imposed by sec. 1977, Stats. 1898. *Wisconsin Central R. Co. v. Phœnix Ins. Co.* 313
2. Where an agent is employed to procure insurance, such employment, in itself, does not authorize him to represent the assured for the purpose of receiving notice of cancellation of subsisting insurance, and to substitute other insurance in place of the insurance sought to be canceled. *Ibid.*
3. Where an insurance agent procures insurance for the owner by applying to another agent to write it, without any direction from the assured to the latter, the agent receiving the order from the assured, by force of sec. 1977, Stats. 1898, is the agent of the company issuing the insurance. *Ibid.*
4. In an action on insurance policies issued by defendant's agent at the request of F. & L., insurance brokers to whom plaintiff had applied for insurance, it appeared, among other things, that the defendant's agent attempted to cancel such policies and substitute others. Under the evidence stated in the opinion, it is *held* that F. & L. had no express or apparent authority from

plaintiff to represent it and to receive notice of cancellation of policies, or to procure and accept new insurance in place of the subsisting policies ordered canceled by defendant. *Ibid.*

Insurable interest: Insurance by bailee.

5. Defendant, engaged in the business of manufacturing, buying, selling and repairing vehicles, received plaintiff's vehicle for repair, and thereafter to hold for the purpose of selling it for her. While so held a fire occurred injuring defendant's buildings, and damaging, among other property, plaintiff's vehicle. Defendant had insurance on its stock, consisting of vehicles manufactured and in process of manufacture, and all materials and supplies used in or appertaining to its business, "either its own or held by it in trust or on commission, or in storage or for repair, or sold but not removed." On the day following the fire, plaintiff notified defendant that she would look to it for indemnity for her loss under the insurance so effected in its name, and also so informed the representatives of the insurance companies. Defendant denied all right of the plaintiff to indemnity, and refused to include in its proofs of loss any damage to plaintiff's vehicle above the amount due for repairs, settled with the insurance companies on such basis, and released and surrendered its policies. *Held*, that the insurance policies were unambiguous and certain, covered plaintiff's vehicle, and were an insurance to indemnify her against loss or damage thereto. *Johnston v. Charles Abresch Co.* 130

6. It is lawful for a bailee or agent holding property for the purpose of repair, or of sale, to insure it against loss or damage by fire for the protection of his special interest and that of the owner. Such insurance may be taken in the name of the possessor, and, in case of loss, the avails are to be applied in satisfaction of his claim against the property, and, if there is an amount above such claim, he holds it for the owner. *Ibid.*

7. In such case, while it is one of the requisites of the contract that it must appear therefrom that the owner was within the contemplation of the parties when the insurance contract was made, it is not necessary that the owner should be ascertained nor that the insurance fasten on specific property, nor the owner be known at the inception of the contract. If the owner, when informed, assents to and adopts the contract, he thereby becomes entitled to its advantages as fully as if originally made by his express authority. *Ibid.*

8. In such case, although the owner was not a party to the policies at their inception, after loss and notice, parol evidence is inadmissible to show that the policies do not embody the agreements actually made. *Ibid.*

9. In such case, *held*, that the amount paid by the insurance companies should be paid to plaintiff and defendant in such proportion as the value of the property of each bore to the whole amount paid, except that the defendant had the right to indemnify itself in full, to the extent of its interest in or lien on plaintiff's property, out of the amount recovered for the loss. *Ibid.*

10. In such case, a complaint setting forth the contractual relationship of the parties, defendant's fault in omitting to perform its obligation and consequent pecuniary injury to plaintiff, defendant's collection of the avails of the policies and retention

as its own, expressly waiving the tort, if any, and declaring that plaintiff "sues herein on implied contract," sets forth a cause of action on contract, and not one sounding in tort. *Ibid.*

Standard policy: Additions to terms of policy: Electricity.

11. Under the Wisconsin standard fire policy a clause, in addition to the clauses of the standard policy: "This insurance does not cover any loss or damage to property caused by electric current, whether artificial or natural," cannot be added to such policy. *Wausau Telephone Co. v. United Firemen's Ins. Co.* 535

Cancellation of policy. See INSURANCE, 2, 4.

Adjustment of loss: Arbitration.

12. In an action on a standard policy of fire insurance, where it was established beyond reasonable controversy that the building was not totally destroyed, and it appeared that under the provisions of such policy the damages were adjusted by an arbitration, questions bearing on the amount of loss to the building caused by fire are not open for consideration upon the trial, in the absence of evidence warranting a finding that the arbitrators acted fraudulently, or outside their jurisdiction. *Jacobs v. Queen Ins. Co.* 608

13. In such case, after evidence had been received that the city building inspector was duly authorized to impose upon the owner of a building the duty to take down dangerous walls, the court ruled out evidence of a notice given by such building inspector condemning as dangerous the front wall of the building and ordering it taken down. *Held*, that whether such ruling was proper or not it did not constitute prejudicial error. *Ibid.*

LIFE.

Benefit societies: Change of beneficiary.

14. A married woman, to whom was issued a certificate in a benefit society payable to her husband (who, without special agreement with the wife, retained possession of the certificate and paid the dues necessary to keep the insurance in force), changed the beneficiary without the knowledge of the husband. The change was effected without complying in all respects with the rules of the benefit society, but it nevertheless issued to the wife a new certificate with different beneficiaries, the old certificate still remaining in possession of the husband. *Held*, that no circumstances were disclosed sufficient to give the husband any vested interest in the certificate or its proceeds. *Preusser v. Supreme Hive L. O. T. M.* 164

15. In such case, the mere possession of the certificate or policy by the husband, who has voluntarily paid the dues thereon, all explainable by the marital relations, and consistent with the rights of the wife remaining undisturbed thereby, is not sufficient to show a vested right in the husband, nor to divest the right of the wife to change the beneficiary at will. *Ibid.*

Same: Change to stipulated premium.

16. An assessment insurance association, assignor of defendant, entered into an agreement with plaintiff that, if he paid the specified assessments as called for up to January, 1902, it would pay him the amount of $2,000, provided eighty per cent. of an assessment, at the specified rates, on all its members, would produce that amount. Defendant's assignor took the steps necessary to authorize it to do business under the provisions of

ESTATES. See DOWER. LIFE ESTATES. PARTITION.

ESTATES OF DECEDENTS. See COMPROMISE AND SETTLEMENT, 1, 2. DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. MORTGAGES, 8.

ESTOPPEL.

See BILLS AND NOTES, 9, 11. COMPROMISE AND SETTLEMENT, 1. CONTRACTS, 2. ELECTION OF REMEDIES. MECHANICS' LIENS, 3.

1. Estoppel arises only when a person may reasonably anticipate a change of position by another in reliance on the former's act, and the former is not required to anticipate negligence or ignorance of the law in others. *Loizeaux v. Fremder*, 193
2. Plaintiff took, as collateral, from a corporation of which defendant's son was president, a note of defendant which failed to name any one as payee. There was no express representation of authority to use the note as collateral, and plaintiff, when he took the note, failed to observe the absence of any payee's name, and did not require the person from whom he obtained the note to endorse it. *Held*, that plaintiff was precluded from any right to invoke estoppel. *Smith v. Willing*, 377

EVIDENCE.

Judicial notice. See CUSTOM AND USAGE, 4.

Presumptions. See BOUNDARIES, 2. CUSTOM AND USAGE, 3, 4. EVIDENCE, 20. NEGLIGENCE, 3. PRINCIPAL AND AGENT, 1. SALES, 7. TAXATION, 3.

1. When one has been declared elected by the board of canvassers of the election, and is holding the office under such determination, a presumption is created that he received the number of votes stated in the certificate, and casts on his opponent the burden of showing that the certificate is false. *State ex rel. Leonard v. Rosenthal*, 442
2. In such case, when such presumption is rebutted by competent evidence, it then devolves upon the one holding the office to establish the fact that he received the greater number of votes by other evidence, in order to prevent judgment of ouster. *Ibid.*

Burden of proof. See ASSAULT AND BATTERY, 11, 12. EVIDENCE, 1. SIGNATURES, 1. TRIAL, 11.

Relevancy, materiality and competency. See ASSAULT AND BATTERY, 2–4. COMPROMISE AND SETTLEMENT, 2. CUSTOM AND USAGE, 5. DESCENT AND DISTRIBUTION, 4. EJECTMENT, 5. HIGHWAYS, 3, 5. MECHANICS' LIENS, 8, 9. NEGLIGENCE, 3–7, 17. SALES, 9, 10. STREET RAILWAYS, 5, 6. SUNDAY, 2. TRIAL, 25–27.

3. Evidence as to the best method of handling potatoes found to be rapidly decaying is *held* not immaterial, but to have had a bearing upon the question whether the vendee had exercised ordinary care to prevent loss. *Northern Supply Co. v. Wangard*, 1
4. The question whether the potatoes when delivered by the vendor at the agreed place were of good, sound, white stock was a proper one for opinion evidence, but under the written contract in this case, calling only for "good" potatoes, was immaterial. *Ibid.*

5. So, also, under a contract, the question as to what kind of soil the potatoes were grown in was immaterial. *Ibid.*

6. Where a witness has testified that he did not know whether W., one of defendants, knew he had a certain contract or not, it is not error to exclude a question as to whether witness had any reason to believe that one G. had spoken to W. about that contract. Such testimony is at most conjectural. *John O'Brien Lumber Co. v. Wilkinson,* 272

7. While evidence of previous independent transactions is inadmissible unless it tends to prove motive, intent, or custom, yet where it appears that in making a contract, reference was distinctly made to a previous transaction of a similar character, and that it was then agreed that plaintiff might deliver grain, and take the price later on, as was done on the former occasion, the terms of the former transaction are, in effect, imported into the bargain, and evidence as to its terms is made competent. *Sullivan v. Mauston Milling Co.* 360

8. Where two names appeared on the poll list of an election as Frank Bersche and George Long, it is not error to admit evidence that they were non-residents, where it was alleged in the complaint that two of the votes claimed to be illegal were cast by Frank Bierse and George Lang. *State ex rel. Leonard v. Rosenthal,* 422

9. The non-residence of one in a particular town, village, or city cannot be proved by testimony that a person of the same name was found to be included in the directory of a nearby populous city. *Ibid.*

10. The voluntary declarations of a voter who voted at an election, that he was not a resident of the voting precinct at that time, are admissible. *Ibid.*

Same: Experiments.

11. Testimony of experiments is competent if the conditions be sufficiently similar, so that the facts attending the experiment will fairly illustrate the point in issue. *Zimmer v. Fox River Valley E. R. Co.* 643

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Same: Res gestæ. See EVIDENCE, 14. HIGHWAYS, 5.

Admissions. See HIGHWAYS, 5.

13. Where there was evidence tending to prove admissions by both plaintiff and defendant, and plaintiff admitted making only part of the alleged admissions, a general instruction on the subject of admissions, stated in the opinion, is *held* not to have misled the jury as to the admission which plaintiff acknowledged he made. *Sullivan v. Mauston Milling Co.* 360

14. Declarations of a public officer cannot be given in evidence as admissions to bind the municipality of which he is the agent, unless they are part of the *res gestæ. Garske v. Ridgeville,* 503

Declarations. See DESCENT AND DISTRIBUTION, 4. EVIDENCE, 10. HIGHWAYS, 5.

Hearsay.

15. In an action of *quo warranto* to test title to the office of assessor of a village, witnesses who did not live in the village at the time of the election, but went into the village some weeks afterwards, testified that they then made systematic inquiries at various manufacturing establishments and boarding houses in the village, as well as of residents of the village, as to whether certain alleged illegal voters were known to reside in the village on election day. These witnesses were then allowed to testify, against objection and exception, that, from such investigation, they were not able to find that such voters resided in the village on election day. *Held*, that the great practical difficulty of proving non-residence did not justify the admission of such evidence in violation of the rule excluding hearsay evidence. *State ex rel. Leonard v. Rosenthal*, 442

16. In such case, in order to qualify the witness to testify as to the residence in the district of one alleged to be an illegal voter, it is not absolutely necessary that the witness should have actually resided in the election district at the time of the election, but he should show that, at the time, he was to some substantial extent acquainted with the inhabitants of the district. *Ibid.*

Public records: Certificates.

17. At common law the fact that a specific document or entry did not exist in public records might be proven by the testimony of the custodian or of any one who had made a search of the records for that purpose, and such rule is not changed by sec. 4163, Stats. 1898 (providing for official certificate that a document, etc., cannot be found). *State ex rel. Leonard v. Rosenthal*, 442

Production of documentary evidence.

18. In an action of replevin defendant procured an order under sec. 4183, Stats. 1898, requiring plaintiff to deposit certain documents with the clerk of the court. Under the facts, stated in the opinion, it was *held* that the defendant was not in a position to insist upon the production of the documents, and in default thereof that plaintiff be punished. *Roberts v. Francis*, 78

19. In such case, under the facts stated in the opinion, there was no abuse of discretion in the refusal of the court to enforce such order. *Ibid.*

20. The failure of the plaintiff to produce certain documents, is *held*, under the circumstances stated in the opinion, not to raise a presumption that the documents would furnish proof against the claims of plaintiff. *Ibid.*

Parol evidence. See COMPROMISE AND SETTLEMENT, 2. DESCENT AND DISTRIBUTION, 3, 5. INSURANCE, 8.

Opinion evidence. See EVIDENCE, 4.

Weight and sufficiency. See ADVERSE POSSESSION, 1, 3, 4. APPEAL, 23, 25. BOUNDARIES, 2. BROKERS, 2. COMPROMISE AND SETTLEMENT, 4. CONTRACTS, 1. DESCENT AND DISTRIBUTION, 2–5. EXECUTORS AND ADMINISTRATORS, 4. FRAUD. HIGHWAYS, 1, 2, 4, 5. INSURANCE, 4. MASTER AND SERVANT, 1–3, 5. MECHANICS' LIENS, 1, 5. MORTGAGES, 2, 9. NEGLIGENCE, 1–15, 17. RAILROADS, 4. SETOFF. SIGNATURES, 2. TAXATION, 8–14, 16, 17. TRIAL, 12. VENDOR AND PURCHASER, 2. WITNESSES, 1.

EXCEPTIONS. See APPEAL, 3–9.

EXCESSIVE DAMAGES. See DAMAGES.

EXECUTORS AND ADMINISTRATORS.

See COMPROMISE AND SETTLEMENT, 1, 2. DESCENT AND DISTRIBUTION. MORTGAGES, 8. WILLS. WITNESSES, 2.

Jurisdiction of county courts: Letters of administration: Subsequent discovery of will.

1. The jurisdiction of the county court over the settlement of the estate of one who at the time of his death was an inhabitant or resident of the county over which such court exercises jurisdiction, does not depend upon the presence or absence of a will. *Perkins v. Owen,* 238
2. Where letters of administration are issued on the mistaken idea that no will was left, and a will be afterward found and proved, such letters and all acts of the county court inconsistent with the due administration of the estate under the terms of the will may be revoked; but such action is not taken because the prior proceedings are void for lack of jurisdiction to administer the estate as intestate, but on the ground that they have been erroneous. *Ibid.*
3. In such case, in the absence of some controlling intervening fact, the county court should set aside the administration proceedings, unless rights thereunder have become confirmed by virtue of the statute of limitations. *Ibid.*

Allowance of claims.

4. In an action on a claim filed against a decedent's estate the evidence, stated in the opinion, is *held* to fail to establish fraud or duress, or that consideration for the claim was the compounding of a felony. *Currie v. Michie,* 120

Accounting and settlement: Liability on administration bonds.

5. Under sec. 2443, Stats. 1898, county courts have jurisdiction to determine the amount justly allowable to the attorneys of the administrator out of the estate on account of legal services performed by them, to make the same a lien on the assets thereof, and to order the lien extinguished by using funds for which the administrator is responsible. *Carpenter v. U. S. Fidelity & Guaranty Co.* 209
6. The court having exercised its jurisdiction in the respect last noted, its decision cannot be disturbed in an action against the sureties on the bond of a defaulting administrator. *Ibid.*
7. Where an administrator's account has been duly settled, including an adjudication of the amount due his attorneys for services and disbursements, and final order entered requiring the payment direct to the attorneys of the sum so awarded them, such final order is conclusive in an action brought in the name of the county judge upon the administrator's bond against the sureties. *Ibid.*

EXEMPLARY DAMAGES. See ASSAULT AND BATTERY, 7, 8.

EXEMPTIONS. See TAXATION, 1–3.

EXPERIMENTS. See EVIDENCE, 11, 12.

EXPRESS AUTHORITY. See INSURANCE, 4, 7.

EXPRESS CONTRACT. See CORPORATIONS, 9, 10. TRIAL, 24.

EXPRESS WARRANTY. See SALES, 9, 10.

FARM CROSSINGS. See RAILROADS, 2–5.

LIMITATION OF ACTIONS.

See APPEAL, 27. CORPORATIONS, 7. EQUITY, 3. TAX TITLES, 3, 6.

Except in an action for relief on the ground of fraud in a case which was, on and before February 28, 1857, cognizable solely by a court of chancery (subd. 7, sec. 4222, Stats. 1898), the running of the statute of limitations is not postponed until the discovery, by the aggrieved party, of the facts constituting the fraud. *Pietsch v. Milbrath*, 647

LIS PENDENS. See EJECTMENT, 5.

LOCAL CUSTOM. See CUSTOM AND USAGE, 2, 3. PLEADING, 3.

LOGS AND TIMBER. See LIENS. RAILROADS, 1.

LUMBER. See LIENS.

MALICE. See ASSAULT AND BATTERY, 1, 7, 8.

MALICIOUS TRESPASS. See CRIMINAL LAW, 4.

MANDAMUS. See RAILROADS, 4, 5.

MARRIED WOMEN. See BASTARDY, 1. INSURANCE, 14, 15. MORTGAGES, 7, 8. PROPERTY. WITNESSES, 2.

MASTER AND SERVANT.

Master's liability for injuries: Appliances and places for work.

1. In an action for negligence for personal injuries to a servant from working with his bare hands and arms in a vat of fur dye, after the master had told him that it was not dangerous, the evidence, stated in the opinion, is *held* to be sufficient to require the submission to the jury of the questions of negligence and proximate cause. *Segall v. Padlasky*, 207
2. In an action for personal injuries received by a fifteen-year-old boy from the rapidly revolving knives of a planing machine, under the facts stated in the opinion, *held:*
   (1) The plaintiff's evidence, that he was ignorant of the danger, was not wholly incredible.
   (2) A reasonable mind could absolve him from negligence in attempting to do that which he had seen others do in safety.
   (3) It was error to direct a verdict for the defendant. *Horn v. La Crosse Box Co.* 399
3. In such case the facts, stated in the opinion, are *held* sufficient proof of negligence. *Ibid.*

Same: Fellow-servants: Vice-principal.

4. Whether an act is that of a fellow-servant or a vice-principal depends not on the grade or the position of the person doing it, but on the character of the act. *Horn v. La Crosse Box Co.* 399

Same: Contributory negligence.

5. In an action for personal injuries received by a servant in a planing mill, under the evidence, stated in the opinion, plaintiff is *held* to be guilty of contributory negligence. *Gardner v. Paine Lumber Co.* 338

MATERIALITY. See EVIDENCE, 3-12.

MATERIALMEN. See MECHANICS' LIENS, 5, 6.

MAXIMS.

Boni judicis est ampliare justitiam, 461.
Equity delights in doing justice, and that not by halves, 495.
Expressio unius est exclusio alterius, 670.
Lex deficere debet in justitia exhibendo, 533.
Lex nemini facit injuriam, 528.
There is no wrong without a remedy, 512, 529, 648, 671.

1. In applying the maxim "There is no wrong without a remedy" courts of law and equity as well must regard wrong, so called, which is not remediable because of the statute on the subject, as not wrong at all in a judicial sense. *Rowell v. Smith*, 510
2. The maxim that there is no wrong without a remedy, does not apply to a wrong, so called, which is not a wrong at all, because the written law makes it otherwise. *Pietsch v. Milbrath*, 647

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS.

Right to lien: Contracts: Continuity of work.

1. It is not an essential under the lien remedy given to mechanics and materialmen by ch. 143, Stats. 1898, that the contract for furnishing the labor or material should be so definite as to enable the one personally liable to the lien claimants, or the owner or person interested in the structure involved, to determine precisely the contract price for such labor or material or the details of the work. It is sufficient as to work or material alleged to have been furnished under one contract to show that it was in fact so furnished. *Hutchins v. Bautch*, 394
2. While there must be some visible commencement of work under the lien statute to fix the time of the commencement of the lien claim, there need not be visible continuity of work from first to last in order that the last labor or material furnished may relate back to the commencement of work, and all be regarded as furnished under one contract or an entire running account. *Ibid.*
3. Delay in completing lienable contract work sufficient to indicate so clearly either that the contract has been fully performed or has been abandoned, as to excuse third parties dealing with the property from making inquiries in respect to the matter, may affect the right of lien upon principles of estoppel *in pais*. *Ibid.*
4. If, while a person is in the performance of lienable work on land under contract with the owner the latter sells the land to a third party, such person is in any event entitled to a lien thereon for the work and material already furnished whether he completes his contract or not, if failure in that regard is without fault on his part. An offer by him to perform, as regards preservation of his lien, is equivalent to performance. *Ibid.*

Subcontractors, workmen and materialmen: Service of notice.

5. The notice required by the statute to be served upon the owner by one who claims a mechanic's lien as a subcontractor, where the owner is out of the state, is *held* properly served upon one who attended to the owner's business in his absence, and who had authority to represent him in transactions pertaining to his business affairs. *Laev Lumber Co. v. Auer*, 178

6. Under sec. 3315, Stats. 1898, a notice by a subcontractor to the owner, setting forth that the subcontractor was employed to furnish, and did furnish, material as specified, for the erection and construction of the building, with the amount due from the principal contractor, fulfils the requirements of the statutes. It is not necessary that the notice should state that, at the time of the sale to the principal contractor, it was agreed that the material was furnished to be used "for or in or about" the erection or construction of the building. *Ibid.*

Enforcement: Amendment of claim for lien.

7. Where, in an action to foreclose a mechanic's lien, neither the claim for the lien nor the complaint set forth the contract on which plaintiff finally recovered, nor was any formal amendment of either document made, but the evidence in respect to such contract was without serious dispute, and was admitted without objection, both the claim and complaint may be considered as amended to conform to the proofs as effectually as if formal amendments had been ordered. *Sherry v. Madler,* 621

Same: Evidence.

8. In an action to foreclose a mechanic's lien on a house agreed to be built according to agreed plans and specifications, it is error to rule out testimony tending to prove that certain parts of the work and materials did not accord with the requirements of the plans and specifications, and that the house was of less value on account of such defaults. *Sherry v. Madler,* 621

9. In an action to foreclose a mechanic's lien, the original complaint was upon *quantum meruit,* but was, in effect, amended by the action of the court into a complaint alleging performance of a contract to build a house according to certain plans and specifications for a fixed sum. *Held,* that a general denial, pleaded to the allegations of the original complaint, put in issue the question whether the house had been completed according to the plans and specifications agreed upon, and allowed the defendant to prove nonperformance. *Ibid.*

Same: Owner's damages for breach of contract.

10. In an action to foreclose a mechanic's lien, the trial court found the original contract for building a house was invalid, and that a subsequent contract was made. On reversal for erroneously excluding evidence tending to prove that certain parts of the work and material did not accord with the requirements of the plans and specifications, and that the house was of less value on account of such defaults, *held:*

(1) The question as to the validity of the original contract and as to the making of the subsequent contract must be regarded as settled by the findings, and not open to be disturbed.

(2) Further evidence should be taken on the following questions: First. Was the house built in compliance with the plans and specifications furnished? Second. If not built in exact compliance with them, was there such substantial compliance in good faith as would entitle the plaintiff to recover the contract price, less proper deductions for defects and defaults in performance? *Sherry v. Madler,* 621

11. In such case, if the latter question is answered in the affirmative, the rules by which proper deductions may be ascertained are:

(1) In case of entire neglect to furnish an item of labor or

material, or in case of a defect which may easily be remedied without taking down and reconstructing a substantial portion of the building, the allowance should equal the reasonable expense of supplying or correcting the defect.

(2) In case of a defect which could only be remedied by taking down and reconstructing some substantial portions of the building, the allowance should be the amount which the building is worth less, by reason of the defect, than the contract price. *Ibid.*

MEMORANDA. See WITNESSES, 3, 4.

MENTAL SUFFERING. See DEAD BODIES.

MISREPRESENTATIONS. See INTOXICATING LIQUORS, 3.

MISTAKE. See COMPROMISE AND SETTLEMENT, 4. CONTRACTS, 2. ELECTION OF REMEDIES. SPECIFIC PERFORMANCE, 4. TRIAL, 27.

MONEY HAD AND RECEIVED. See TAXATION, 16.

MORTGAGES.

Nature and essentials: Form.

1. When lands are conveyed as mere security for a loan, the grantor having no interest in the premises at the time except a bare possession, the transaction is nevertheless a mortgage. *Schneider v. Reed,* 488

Rights and liabilities of parties. See BILLS AND NOTES, 4–6, 11.

Foreclosure: Evidence. See SIGNATURES.

2. In an action to foreclose a mortgage securing a negotiable note, the evidence considered, and *held* insufficient to establish that when plaintiff bought the note and mortgage from the mortgagee, the plaintiff made the mortgagee her agent, so as to charge plaintiff with the agent's knowledge. *Thorp v. Mindeman,* 149

Same: Receiver.

3. In an action to foreclose a mortgage, where there was an ample showing justifying the appointment of a receiver with power to collect rents, etc., the mortgagor is not prejudiced by the inclusion in the receivership of a part of the premises on which the rent has been paid in advance for more than the period of redemption. *Thorp v. Mindeman,* 149

Same: Findings and judgment. See VENDOR AND PURCHASER, 6, 7.

4. In an action to foreclose a mortgage, where, on an issue raised by one who has rights other than as mere mortgagee, all the interested parties being before the court, the court finds that a defendant has some interest in the premises, or claim thereon, which the court can recognize, the court should proceed to determine what that interest is, and by what means it is to be protected in the action. *Schneider v. Reed,* 488

5. Where one of two co-mortgagees is a defendant, the judgment of foreclosure and sale should provide that the sale may be moved by either. *Ibid.*

6. Previous to a loan, the mortgagors agreed that S., one of them, should have a one-third interest on paying his co-mortgagor a certain sum out of the sales of the land. In an action to foreclose such mortgage, it appeared, among other things, that the co-mortgagor conveyed his interest to K., and that S. had never

paid such sum. *Held*, that the judgment of foreclosure should definitely declare the title to the equity of redemption to be in K. as to two thirds and in S. as to one third, in undivided shares, and impose a lien for such sum upon S.'s one third in favor of K., to be paid out of the first sales of the land after the mortgage is discharged, and also provide for the working out of such lien by appropriate directions. *Ibid.*

Same: Deficiency and personal liability: Married women.

7. A married woman joined with her husband in a negotiable note secured by mortgage, in part on her separate estate, and in part on that of her husband, the money promised to be repaid being borrowed for and used by the husband in his business. *Held*, on foreclosure of the mortgage, that plaintiff was not entitled to a personal judgment against the wife for any deficiency that might arise upon a sale of the mortgaged premises. *Loizeaux v. Fremder*, 193

Same: Appeal. See APPEAL, 2.

8. On foreclosure of a mortgage, the judgment of foreclosure and sale, entered on default November 30, 1900, adjudged the estate of defendant's testatrix, a married woman, personally liable for the debt, and contained provision for a judgment for deficiency against her estate. On confirmation of the report of sale, such deficiency judgment was entered February 5, 1902. Defendant, as such executor, on February 4, 1904, appealed from such deficiency judgment, and also from that part of the judgment of foreclosure and sale which adjudged the estate of his testatrix personally liable. *Held*, that the judgment of foreclosure and sale, not having been appealed from within the time limited by statute, was conclusive on the executor, and that there was no merit in the appeal from the formal judgment for deficiency. *Pereles v. Leiser*, 233

Same: Resale.

9. An application for a resale of property sold on foreclosure, based on inadequacy of the price at which the premises were struck off, is addressed to the sound discretion of the court, and will not be reversed on appeal where the preponderance of the evidence is to the effect that the value of the property is not much above the amount for which it was sold, and that, considering the character of the sale, the price obtained was not inadequate. *Merrill v. Ladendorf*, 140

MOTIVE. See ASSAULT AND BATTERY. EVIDENCE, 7. WITNESSES, 10.

MUNICIPAL CORPORATIONS.

Proceedings of common council. See CERTIORARI, 3. INTOXICATING LIQUORS.

Same: Ordinances. See INTOXICATING LIQUORS, 3.

Officers and agents. See EVIDENCE, 14.

Same: Police force: Pension fund: Right to participate.

1. Under ch. 265, Laws of 1899, providing for the creation of a pension fund for policemen in cities of the first class, *held:*

(1) The governing board of the pension fund cannot enter the final order of retirement unless the candidate is *in præsenti* a policeman.

(2) The right to a pension is not vested at the time of the disablement, subject to the report of the examining physician, so as to suspend the authority of dismissal for cause.

(3) The act applies to one who was a policeman when the act took effect, or thereafter became such, but conditioned upon his satisfying the calls of eligibility at the time when the retiring board is required to act.

(4) The act has no reference to those provisions of the city charter regarding the organization and management of the police force, which are subjects entirely foreign to the pension law. *State ex rel. Weber v. Trustees of Policemen's Pension Fund,* 245

Streets: Nonuser: Abandonment.

2. A strip of land was dedicated to the public use as a street by the then owner in 1870, was accepted by the public, and continuously used as a street until 1880. In 1879 the plaintiff acquired title to the parcel of land immediately on the south, and in 1894 conveyed such parcel to defendant. From 1880 the strip was not used for public travel, but in 1887 the city constructed a sewer through the strip and has maintained it ever since, and in 1884 accepted a deed thereof from the original proprietors in which the strip was described as "formerly occupied as a street." In 1904 the city conveyed the south half of the strip to the plaintiff, who brought this action to quiet title in himself. In 1894 the position of plaintiff had not been changed or influenced in the least by the action or non-action of the city. *Held:*

(1) That the strip in question was a part of the public street in 1894.

(2) That defendant, by the conveyance from plaintiffs of the parcel on the south in 1894, acquired title to the south half of the strip subject to the public rights. *Arnold v. Volkman,* 54

Same: Public improvements: Damages.

3. Upon the ground that a village board had not taken the requisite steps under the statute to give its proceeding validity under sec. 905, Stats. 1898, the village cannot be enjoined, since the steps taken by the board clearly indicated action under the authority granted for making general street improvements, by subd. 11, sec. 893, to be paid for out of the general street improvement fund, in respect to which no irregularity was suggested or found. *McCullough v. Campbellsport,* 334

4. In the absence of any law giving owners of real estate adjoining a public street or highway a right to recover damages from the municipality on account of a change of grade, no damages are recoverable, unless the premises of the adjoining owner have been injured by the negligence of the municipality. *Ibid.*

5. In the absence of any law giving owners of real estate adjoining a public street or highway a right to damages against a municipality on account of a change of grade, such change of grade is not the taking of private property for public use. *Ibid.*

Defects in bridges and culverts: Damages.

6. Plaintiffs' brick yard was flooded, and injury done to the yard and personal property thereon. The flood was caused by the negligence of defendant in so constructing a culvert that it was inadequate for the usual flow of water from ordinary rain falls and from melting snows. *Held,* that money expended for cart-

ing off refuse, and cleaning up, leveling and restoring the yard was a proper element of damage, although the evidence failed to specify the items of expense, and the court elsewhere found that plaintiffs had negligently contributed to the loss of some slabs and wood. *Davelaar v. Milwaukee,* 413

7. In such case, it further appeared that plaintiffs had a quantity of dry clay for making pressed brick, which became saturated with water and reduced to mud, thereby destroying it for such use. *Held,* that plaintiffs were entitled to recover the expense of drying and housing such dry clay. *Ibid.*

8. In such case, it appeared that plaintiffs submitted their business enterprise to the control and management of an association, by which the output of their yard was regulated. *Held,* that the court was justified in refusing to allow damages for the interruption of their business. *Ibid.*

Same: Sidewalks: Defects causing injury: Charter provisions: Disallowance of claim: Appeal.

9. A complaint in an action against a city, after alleging the incorporation thereof, the defect in a sidewalk, and the injuries received by plaintiff by reason of such defect and the manner in which they were received, alleged in detail the presentation of notice of the injury as required by sec. 1339, Stats. 1898; the due filing of the claim for damages, the nonaction thereon for sixty days by the common council, and the giving of the notice of and bond upon appeal, as required, but failed to allege that the clerk had made his return to the circuit court of the proceedings, etc. *Held,* that it was not necessary to allege in the complaint the making and filing of the clerk's return in response to the appeal, since the court had jurisdiction for some purposes upon the perfecting of the appeal, although it did not have power or jurisdiction to try and determine the cause until the return was made and filed. *Horan v. Eau Claire,* 86

Negligence: Injuries to employees.

10. A city was empowered by its charter to organize a fire department, to be composed of such officers and men as should be required and employed in the management and conduct of its fire apparatus, to establish rules and regulations for such department, to purchase material, and to equip and run such department, including the power to employ the officers and men specified, and all other necessary help. Plaintiff, in the employ of a coal dealer, was assisting in weighing coal purchased by the city for use in its fire department, and in doing so it was necessary to move a pair of scales. B., an employee in the fire department of the city, was in charge of a tug operated and controlled by the city, to which the coal was to be delivered, and so interfered with the moving of the scales that, without the fault or neglect of plaintiff, they fell and injured plaintiff. *Held:*

(1) B., at the time of the injury, was acting within the scope of his employment.

(2) The city was engaged in the performance of a public service, from which it derived no special benefit or advantage in its corporate capacity, but which it was bound to see performed in pursuance of a duty imposed by law for the general welfare of its inhabitants, and was not liable for the personal injury occasioned by the negligence of B. *Manske v. Milwaukee,* 172

MUTUAL MISTAKE. See COMPROMISE AND SETTLEMENT, 4. CONTRACTS, 2. SPECIFIC PERFORMANCE, 4.

NAMES. See EVIDENCE, 8.

NAVIGABLE WATERS.

See BOUNDARIES. TRESPASS.

1. The grant of lands on the bank of a navigable stream, made without limitation or reservation as to adjacent islands, vests in the purchaser the title to any unsurveyed islands lying between the bank and the thread of the stream. *Sliter v. Carpenter*, 578

2. Plaintiff and his assignors were the owners of the lands on the south bank of a navigable river opposite which was an unsurveyed island, the main body of which island lay south of the thread of the stream. Defendant entered on this island and cut timber on that part of the island lying near the south bank of the river. No separation, by conveyance, of the island from the bank was shown. *Held*, that the plaintiff was entitled to recover from the defendant the value of the timber cut and removed therefrom. *Ibid.*

NAVIGATION. See ADMIRALTY.

NEGLIGENCE.

Acts and omissions constituting negligence: Personal conduct. See ACTION. APPEAL, 37. BILLS AND NOTES, 10, 11. EQUITY, 1. ESTOPPEL, 1. NEGLIGENCE, 5. STREET RAILWAYS. TRIAL, 4–6, 14, 16.

1. In an action for personal injuries, the evidence, stated in the opinion, is *held* to sustain a finding that want of ordinary care and prudence on the part of the defendant was not the proximate cause of plaintiff's injury. *Lightfoot v. Winnebago Traction Co.* 479

Same: Dangerous substances and structures. See HIGHWAYS, 2–5. MASTER AND SERVANT, 1–3, 5. MUNICIPAL CORPORATIONS, 4–9. RAILWAYS, 6.

2. In an action for personal injuries to an infant alleged to have been occasioned by defendant's negligence in leaving within the reach of such child a wire, in such position that it came in contact with a heavily charged electric wire, the evidence, stated in the opinion, is *held* to show that defendant was guilty of a negligent act, from which an injury to another was to be anticipated as a natural and probable result. *Nagle v. Hake*, 256

3. In an action for personal injuries sustained by coming in contact with a wire charged with electricity, a witness testified to examining the wire and its fastenings. *Held*, that it was not error on cross-examination to strike out an affirmative answer to an inquiry as to whether the wire was fastened to the insulator in the usual way. Such would be the presumption, in the absence of any evidence. *Ibid.*

4. In an action for personal injuries to an eight-year-old infant occasioned by coming in contact with a live wire, where it ap-

peared that both the father and mother knew of the wire before the injury, it is not error to sustain an objection to a question asked defendant, as to whether the mother objected to the defendant's placing the wire where he did. *Ibid.*

5. In such case, it is not error to permit the father and mother to testify, against objections, that no one told them the wire was dangerous, and that they did not know that it might become dangerous. Such testimony is competent as bearing on the question of the parents' negligence. *Ibid.*

6. Where an eight-year-old child was injured by coming in contact with a telephone wire, which had been negligently allowed to come in contact with heavily charged electric and trolley wires, evidence of an engineer employed by the light and railway company as to the voltage carried on its electric light and trolley wires; as to the effect of contact between wires; as to the insulation of wires and the absence of guard wires, and other facts tending to show the condition of the various wires in the vicinity at the time of the injury, is admissible. *Ibid.*

7. In an action for injuries from a telephone wire heavily charged with electricity by coming in contact with a live wire, where a witness had testified on direct examination that a certain wire, maintained at a certain point, was covered with what was called "weather-proof" insulation, it was not error to exclude as improper cross-examination, questions as to whether additional insulation would not be safer; whether there would not be less danger in case of contact with another wire, and whether it was not customary to place guard wires over such wires to prevent contact. *Ibid.*

Same: Condition and use of property.

8. One may be as careless as he pleases with reference to his own property and not be charged with negligence in law, unless an ordinarily prudent person might reasonably anticipate that such carelessness might probably result in injury to others. *Knickel v. C. & N. W. R. Co.* 327

Proximate cause. See DAMAGES, 2–4. MASTER AND SERVANT, 1–3. NEGLIGENCE, 1, 12. TRIAL, 4, 6.

Contributory negligence. See HIGHWAYS, 2. STREET RAILWAYS, 4–7.

9. Reasoning is not due care when opportunity for observation exists. *Goldmann v. Milwaukee E. R. & L. Co.* 168

10. It may be the most obvious negligence to exercise a clear right, and, if so, and contributing, it precludes recovery. *Ibid.*

11. Mere carelessness does not prevent recovery for the negligent acts of another, unless an ordinarily prudent man would have anticipated probability of some injury, nor can it defeat the action unless it did in fact contribute to the injury. *Lynch v. Waldwick,* 351

12. Where the jury have found that the defendant's negligence was not the proximate cause of the plaintiff's injury, it is unnecessary to consider the question of contributory negligence. *Lightfoot v. Winnebago Traction Co.* 479

Same: Imputed negligence.

13. In this state, the driver of a private conveyance is the agent of the person in such conveyance, and the driver's negligence, if it contributes to the injury complained of by such person, will

defeat the action, and it is not error to so instruct the jury. *Lightfoot v. Winnebago Traction Co.* 497

Wanton and wilful injury: Gross negligence. See ACTION.

14. The term "negligence" by itself suggests only inadvertence or want of ordinary care, and however great may be the degree of such want of care, so long as the element of inadvertence remains, wilfulness is excluded. *Rideout v. Winnebago Traction Co.* 297

15. The term "gross negligence" signifies wilfulness. It involves intent, actual or constructive, which is a characteristic of criminal liability. If one is guilty of inadvertence causing injury to another, that one's fault is denominated want of ordinary care. If one is guilty of wilful misconduct causing actionable injury to another, the former's fault is denominated "gross negligence." *Ibid.*

16. Since in the first case suggested intention to do the injury, actual or constructive, must be absent and in the second case present, a complaint using language to describe defendant's fault appropriate to both species of misconduct, as if they occurred at one and the same time, and that one included the other, is indefinite and uncertain. *Ibid.*

17. Gross negligence does not include ordinary negligence, and proof of the former does not prove but rather disproves the latter. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. ESTOPPEL, 2. MORTGAGES, 2, 7. PRINCIPAL AND SURETY, 1, 2.

NEW TRIAL.

See APPEAL, 10. ASSAULT AND BATTERY, 9. TRIAL, 17–24, 27, 28.

1. When a new trial is granted without the imposition of terms, it raises a presumption that the court deemed the verdict perverse, which is overcome if the record discloses some evidence to sustain the verdict. *Wolfgram v. Schoepke,* 19

2. In such case, unless there is an abuse of discretion, the order will be sustained, except in respect of the failure to impose terms. *Ibid.*

NOMINAL DAMAGES. See DEAD BODIES.

NONRESIDENCE. See EVIDENCE, 8–10, 15, 16.

NONSUIT. See TRIAL, 30.

NONUSER. See MUNICIPAL CORPORATIONS, 2.

NOTICE. See HIGHWAYS, 4, 5. INSURANCE, 2, 4, 14. JUDGMENTS, 1, 3. LIFE ESTATES, 1. MECHANICS' LIENS, 1–6. MORTGAGES, 2. SALES, 2. TRIAL, 1, 3.

OBSTRUCTIONS. See HIGHWAYS, 1.

OCCUPANTS. See TAX TITLES, 2.

OCCUPATION. See ADVERSE POSSESSION. APPEAL, 27.

OFFER. See MECHANICS' LIENS, 4.

OFFICERS. See ASSAULT AND BATTERY, 10. CLERKS OF COURTS. CORPORATIONS, 8–11. EVIDENCE, 14. HIGHWAYS, 5. TAXATION. TRIAL, 10, 24.

OFFSET. See APPEAL, 31. LIENS, 2. PRINCIPAL AND SURETY, 1, 2. SET-OFF.

OPINION EVIDENCE. See EVIDENCE, 4.

OPTION. See TRIAL, 17–21.

OUSTER. See EVIDENCE, 2.

OWNERS. See TAX TITLES, 2.

PARENT AND CHILD. See ADOPTION. COMPROMISE AND SETTLEMENT, 3. DESCENT AND DISTRIBUTION, 1–4. NEGLIGENCE, 4–6.

PAROL EVIDENCE. See COMPROMISE AND SETTLEMENT, 2. DESCENT AND DISTRIBUTION, 3, 5. INSURANCE, 8.

PARTIES. See BASTARDY, 1, 2, 4. DEAD BODIES. JUDGMENTS, 2, 3. PLEADING, 2. TAXATION, 18.

PARTITION.

1. Under the section of the statutes governing partition (sec. 3101, Stats. 1898), a widow in possession of the homestead, and having unassigned dower in the other real estate, cannot maintain an action of partition against the heirs of the husband. *Ullrich v. Ullrich,* 176

2. Such want of right in the surviving widow to maintain an action of partition is not changed, either expressly or by implication, in the enactment of ch. 336, Laws of 1899, or of ch. 280, Laws of 1903. *Ibid.*

PART PERFORMANCE. See FRAUDS, STATUTE OF, 3, 5, 6.

PARTY AGGRIEVED. See APPEAL, 2. LIMITATION OF ACTIONS.

PAYMENT. See BILLS AND NOTES, 9–11. LIENS, 2, 3. SALES, 4.

PENSIONS. See MUNICIPAL CORPORATIONS, 1.

PERSONAL INJURIES. See APPEAL, 37. COMPROMISE AND SETTLEMENT, 3. HIGHWAYS, 2–5. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 4–9. NEGLIGENCE. STREET RAILWAYS. TRIAL, 4–6, 14, 16.

PERVERSITY in verdict. See TRIAL, 17–21.

PLEADING.

Complaint. See ACTION. BASTARDY, 1. CUSTOM AND USAGE, 4. DEAD BODIES. INDICTMENT AND INFORMATION. INSURANCE, 10. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 16. QUO WARRANTO, 1.

Same: Statutory allegations.

1. Where a statute imperatively requires a complaint to state a certain fact, such averment is essential to the cause of action. *State ex rel. Leonard v. Rosenthal,* 442

Answer. See ADMIRALTY. EJECTMENT, 1–3. GARNISHMENT, 5. MECHANICS' LIENS, 9.

Counterclaim. See APPEAL, 31, 35. PLEADING, 2–5. TAX TITLES, 7.

Issues between defendants: Cross-complaint.

2. The orderly way of presenting a controversy between defendants is by way of answer containing the essential allegations of a cross-complaint as provided in sec. 2883, Stats. 1898. While it is better pleading to denominate such part of the answer a "cross-complaint," in analogy to the requirements in case of

a counterclaim, failure to so denominate the allegations of the answer is effectually waived by voluntarily answering the same. *Schneider v. Reed*, 4

Demurrer. See APPEAL, 35. BASTARDY, 1. DEAD BODIES. QUO WARRANTO.

Amendments. See MECHANICS' LIENS, 7, 9.

3. Under the facts stated in the opinion, it is *held* that it was not an abuse of discretion to refuse to allow a counterclaim to be amended so as to allege a local custom. *John O'Brien Lumber Co. v. Wilkinson*, 272

4. Defendants counterclaimed for the balance due on the sale and delivery of a locomotive, which the undisputed evidence showed had been mortgaged to plaintiff to secure the repayment of certain advances made to defendants on a logging contract. The locomotive was thereafter sold by the mortgagee at public sale to a third person for less than the debt. The debt for which the mortgage was given had not been paid. *Held*, that it was not error to refuse an amendment to the counterclaim alleging that plaintiff had appropriated and converted the proceeds to its own use. *Ibid.*

Defects and objections: Waiver.

5. Where a defendant treated the allegations of his counterclaim as at issue by proceeding with the trial until the close of the evidence before suggesting that there was no reply, he thereby waived the objection. *Northern Supply Co. v. Wangard*, 1

POLICEMEN'S PENSION FUND. See MUNICIPAL CORPORATIONS, 1.

POSSESSION. See ADVERSE POSSESSION. BILLS AND NOTES, 9–11. PRINCIPAL AND AGENT, 1. TAX TITLES, 4–7.

PRACTICE. See ACTION. ADMIRALTY. ADOPTION. ADVERSE POSSESSION. APPEAL. ASSAULT AND BATTERY. BASTARDY. CERTIORARI. COMPROMISE AND SETTLEMENT. COSTS. CRIMINAL LAW. EJECTMENT. ELECTION OF REMEDIES. EQUITY. ESCAPE. EVIDENCE. GARNISHMENT. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. JUDGMENTS. LIENS. MORTGAGES. NEW TRIAL. PARTITION. PLEADING. QUO WARRANTO. SETOFF. SIGNATURES. TRESPASS. TRIAL. WILLS. WITNESSES.

PREJUDICE. See WITNESSES, 10, 11.

PREMIUMS. See INSURANCE, 14, 15. TRUSTS AND TRUSTEES, 5.

PRESUMPTIONS. See BOUNDARIES, 2. CUSTOM AND USAGE, 3, 4. EVIDENCE, 1, 2, 20. NEGLIGENCE, 3. NEW TRIAL, 1. PRINCIPAL AND AGENT, 1. SALES, 7. TAXATION, 3.

PRINCIPAL AND AGENT.

See BROKERS. CORPORATIONS, 11. INSURANCE, 1–4. MORTGAGES, 2. REPLEVIN. SALES, 9, 10. SETOFF, 3. TRIAL, 1.

1. While the facts of possession and control of a principal's property by an agent may be evidence to show authority to sell, such evidence cannot be made the basis of a presumption that the agent might exchange the property of his principal, whereby the transferee, claiming through the transaction, can resist recovery of it by the true owner. *Roberts v. Francis*, 78

2. Ratification of a transfer of property by an agent cannot arise while the principal is in ignorance of the transaction, and when, after knowledge of the transfer, it is persistently repudiated. *Ibid.*

PRINCIPAL AND SURETY.

See EXECUTORS AND ADMINISTRATORS, 6, 7.

1. Where a depositor in a bank is indebted to the bank on a promissory note, signed also by a surety, a failure by the bank to exercise its right to offset the depositor's credit against the note does not operate as a full discharge of the surety's obligation, but only to the extent of the amount of the maker's credit with the bank. *Lowe v. Reddan,* 90

2. In such case, where there are two notes, exactly alike, one being the note in suit, it is not error for the court to apply the maker's credit, one-half to each note. *Ibid.*

3. In an action against the surety on a bond securing certain promissory notes of the principal, a provision of the bond, that "said notes may be from time to time renewed during" the term of the bond, is construed to mean that the obligee may take renewals without affecting the liability of the surety, and not as securing to the principal the privilege to renew from time to time as notes fell due during the term of the bond. *Haney School Furniture Co. v. Medary,* 364

PRISON BREACH. See ESCAPE.

PRIVIES. See JUDGMENTS, 2, 3.

PRODUCTION OF DOCUMENTS, ETC. See EVIDENCE, 18–20.

PROMISSORY NOTES. See BILLS AND NOTES. ESTOPPEL, 2. MORTGAGES, 2–7. PRINCIPAL AND SURETY, 1, 2.

PROMOTERS. See CORPORATIONS, 1–7.

PROOF OF LOSS. See INSURANCE, 5, 17, 18.

PROPERTY.

See BASTARDY, 1. DEAD BODIES.

A trust fund provided to secure the support of a married woman is property in the true sense of the term, although it be in such form that the beneficiary cannot assign, or convey, or devise it, or use it in any manner otherwise than that specified in the terms of the trust. *Meyer v. Meyer,* 538

PROVOCATION. See ASSAULT AND BATTERY, 1, 7, 8, 10–12.

PROXIMATE CAUSE. See DAMAGES, 2–4. MASTER AND SERVANT, 1–3. NEGLIGENCE, 1, 12. TRIAL, 4, 6.

PUBLIC POLICY. See BASTARDY, 5, 7.

PUBLIC USE. See MUNICIPAL CORPORATIONS, 5.

PUNISHMENTS. See CRIMINAL LAW, 5.

PUNITIVE DAMAGES. See ASSAULT AND BATTERY, 7, 8.

PURCHASERS. See VENDOR AND PURCHASER.

QUANTUM MERUIT. See MECHANICS' LIENS, 9. SUNDAY, 2.

QUIETING TITLE. See COMPROMISE AND SETTLEMENT, 1, 2. TAX TITLES, 5, 7.

QUO WARRANTO.

See EVIDENCE, 15.

1. Under sec. 3468, Stats. 1898, providing, among other things, that in actions of *quo warranto*, involving title to a public office, it shall be necessary for the relator to state in his complaint the actual number of legal votes cast for the relator *and for the defendant*, a complaint which states the actual number of legal votes cast for relator, but omits to state, either directly or by implication, the number of legal votes cast for the defendant, is fatally defective, and a demurrer *ore tenus* thereto should be sustained. *State ex rel. Leonard v. Rosenthal*, 442

2. In *quo warranto* to try title to an elective office two questions should determine the case: How many legal votes were cast for the relator, and how many legal votes were cast for the defendant? *Ibid.*

RAILROADS.

Right of way: Contracts: Construction.

1. Under the provisions of a contract relating to the construction of a spur track and right to maintain it for ten years, stated in the opinion, it is *held* that until the plaintiff elected to purchase and pay for the defendant's structures on the right of way, plaintiff was entitled only to such right of way as was needed for the spur track for the ten-year term, or until completed cutting and transportation of defendant's timber within that term. *Chicago, M. & St. P. R. Co. v. H. W. Wright Lumber Co.* 46

Same: Farm crossings.

2. Under sec. 1810, Stats. 1898, the suitability and convenience of farm crossings is to be considered with due reference to the inconvenience and expense to the railroad company, including the possible interruption of trains, the weakening of its tracks, and the increase of the hazard of accidents. *State ex rel. Jacquith v. Wisconsin Central R. Co.* 551

3. Under said section, under-crossings may, in some cases, be required of a railroad as essential to the convenience of the occupants of the land. *Ibid.*

4. Under *mandamus* to compel a railroad company to maintain and keep open an already existing farm crossing for cattle under its tracks, the evidence, stated in the opinion, is *held* to sustain findings that the maintenance of such under-crossing, adequate for relator's cattle, was essential to his occupancy and operation of his farm; that the existing under-crossing was suitable and convenient in the sense of the statute, giving all due regard to the inconvenience and expense thereby imposed on the railroad company, and that it was located in the proper place, whether the owner's interest or the company's be considered. *Ibid.*

5. The duty of a railroad company to construct and maintain such crossings as the court shall determine to be suitable and convenient is a clear legal duty, imposed by express statute, and may be enforced by *mandamus*. *Ibid.*

Same: Taxation of right of way, etc. See TAXATION, 1-3.

Injuries to track, etc. See CRIMINAL LAW.

Injuries to passengers. See DAMAGES, 5. STREET RAILWAYS.
Fires.

6. Defendant railway company maintained upon its right of way a very old and dilapidated warehouse, the roof never having been repaired or reshingled in about thirty years. The shingles and roof boards were rotted, the former being loose and curled up and in many places missing entirely, so as to expose the roof boards. There was no charge of defective apparatus or of negligent operation thereof. Defendant's locomotive communicated fire, by sparks, to such warehouse, which fire, aided by a high wind, was communicated to plaintiff's premises. *Held*, that the jury were warranted in finding defendant's conduct negligent, if the other element of reasonable anticipation of injury were also found. *Knickel v. C. & N. W. R. Co.* 327

RAILWAY BONDS. See TRUSTS AND TRUSTEES, 4.

RATIFICATION. See PRINCIPAL AND AGENT, 2. SUNDAY.

REAL-ESTATE AGENTS. See BROKERS.

REAL PARTY IN INTEREST. See BASTARDY, 1–4, 10.

REAL PROPERTY. See ADVERSE POSSESSION. BOUNDARIES. COMPROMISE AND SETTLEMENT, 1. DOWER. EJECTMENT. LIFE ESTATES. MECHANICS' LIENS. MORTGAGES. MUNICIPAL CORPORATIONS, 2. PARTITION. SPECIFIC PERFORMANCE, 2. TRESPASS. VENDOR AND PURCHASER. WILLS, 3–5.

RECEIPTS. See LIENS, 3.

RECEIVERS. See MORTGAGES, 3.

RECORDS. See EVIDENCE, 17.

REDEMPTION. See CHATTEL MORTGAGES, 1. TAX TITLES. VENDOR AND PURCHASER, 5, 7.

REFERENCE. See APPEAL, 23.

REFORMATION OF INSTRUMENTS. See CUSTOM AND USAGE, 5. FRAUDS, STATUTE OF, 1, 3. SPECIFIC PERFORMANCE, 4.

REHEARING. See APPEAL, 40.

RELEASE. See COMPROMISE AND SETTLEMENT, 1–4. LIENS, 3

RELEVANCY. See EVIDENCE, 3–12.

REMAINDERS. See LIFE ESTATES. WILLS, 4, 5.

RENEWALS. See PRINCIPAL AND SURETY, 3.

RENTS. See LANDLORD AND TENANT. LIFE ESTATES. MORTGAGES, 3. VENDOR AND PURCHASER, 3–7. WILLS, 5.

REPLEVIN.

See CHATTEL MORTGAGES. EVIDENCE, 18.

Where an agent has made a transfer of his principal's property in exchange for other property, and the transferee refuses its surrender, but claims to hold and retain it as owner under the transfer, it is not necessary for the principal to tender return of the property received by his agent before commencing an action of replevin. *Roberts v. Francis,* 78

REPRESENTATIONS. See SALES, 10.

REPUTATION. See ASSAULT AND BATTERY, 3–6. WITNESSES, 11.

REQUESTS FOR INSTRUCTIONS TO JURY. See TRIAL, 14–16.

RES ADJUDICATA. See APPEAL, 35–40. CORPORATIONS, 10. ELECTION OF REMEDIES. JUDGMENTS, 2, 3. MECHANICS' LIENS, 10. MORTGAGES, 8. TAXATION, 1.

RESALE. See MORTGAGES, 9.

RESCISSION. See CONTRACTS, 5. SALES, 11. VENDOR AND PURCHASER, 1, 2.

RES GESTÆ. See EVIDENCE, 14. HIGHWAYS, 5.

RESIDENCE. See EXECUTORS AND ADMINISTRATORS, 1. EVIDENCE, 8–10, 15, 16.

RIGHT OF WAY. See RAILROADS, 1–5. STREET RAILWAYS, 3.

RULES OF COURT.
Circuit Court Rule VIII (Appearance), 147.

SALES.

Requisites and validity. See APPEAL, 28.

Construction of contract. See EVIDENCE, 7. SETOFF. TRIAL, 1, 3.

1. Under a written contract plaintiff sold defendant, a retail grocer, a quantity of "good" potatoes. *Held*, that this called for potatoes of good merchantable quality having at least ordinary keeping qualities, but that there was no implied warranty that they would be fit for the purpose for which they were bought, the only warranty being that the potatoes delivered in execution of the contract were free from latent defects rendering them not such potatoes as the contract called for. *Northern Supply Co. v. Wangard*, 1

2. Upon a sale of "good" potatoes to a retail grocer, known to be such by the vendor, the latter was chargeable with knowledge of the probability that the potatoes sold would be mixed with others and, if liable soon to decay, would injure such others, and may therefore be held liable for such injury to the vendee's other potatoes resulting from breach of the contract in delivering potatoes which were not such as the contract called for. *Ibid.*

3. In such a case the vendee cannot complain of a verdict finding that fifty bushels of other potatoes were spoiled by mingling those sold with them, on the ground that the undisputed evidence showed that seventy-five bushels were so spoiled. *Ibid.*

Same: Entire contract: Cause of action.

4. The provisions of the contract, as to payment, construed, and *held* to exclude the idea that a delivery of all the shoes was a condition precedent to recovery for any portion of the shoes delivered and accepted under the contract. *Racine Shoe Mfg. Co. v. Badger Mfg. Co.* 94

5. In such case, plaintiff had the right to maintain an action for the value of the portion delivered according to the contract, less the amount which might be due to defendant for disbursements and losses. *Ibid.*

Performance of contract. See DAMAGES, 1–4.

Operation and effect: When title passes.

6. Whether or not title to a stock of goods sold has vested in the vendees must be ascertained from the terms of the agreement, if the phraseology employed clearly expresses it; but if it can-

not be so ascertained, then resort must be had to the conduct of the parties as explained by commonly accepted usages in dealing with the subject-matter. *Roberts v. McWatty,* 598

7. On the exchange of a stock of goods for lands, the written contract was not sufficiently explicit in its terms to declare the intention of the parties as to when title to the goods was to pass. In submitting this question to the jury, an instruction, stated in the opinion, is *held* erroneous in that it amounted to a direction that, if any of the conditions enumerated in the instruction were found to exist, then it was *conclusively* presumed that title did not pass until the conditions had been performed. *Ibid.*

8. In such case, proof of such condition is received and submitted to ascertain whether the parties intended that title should pass when the agreement to sell was made, or at some subsequent stage of the transaction. Language in *Smith v. Wisconsin I. Co.* 114 Wis. 151, explained. *Ibid.*

Warranties: Agency. See SALES, 1, 2.

9. A contract of sale being in writing and containing no express warranty, the question whether the vendor's agent who made the contract had authority to bind his principal by warranty is immaterial. *Northern Supply Co. v. Wangard,* 1

10. So, also, the question whether certain representations, claimed to have been made by the agent at the time the contract was made, were statements of fact or mere expressions of opinion, is immaterial. *Ibid.*

Same: Rescission: Election of remedies.

11. In an action to recover damages for difference in value of a warranted horse received in trade for a horse of plaintiff's, under the facts, stated in the opinion, it is *held* that plaintiff was shown to have exercised an election in favor of a rescission of the sale, and therefore could not maintain the present action. *Smeesters v. Schroeder,* 116

SCHOOLS AND SCHOOL DISTRICTS. See CONTRACTS, 1.

SELF-DEFENSE. See ASSAULT AND BATTERY, 4, 6, 10–12.

SENTENCE. See ESCAPE, 3.

SEPARATE ESTATE. See BASTARDY, 1. MORTGAGES, 7.

SERVANTS. See MASTER AND SERVANT.

SERVICE of notice. See HIGHWAYS, 5. MECHANICS' LIENS, 5.

SETOFF.

See APPEAL, 31. LIENS, 2. PRINCIPAL AND SURETY, 1, 2.

1. Plaintiff's assignor was in the habit of making a written assignment of its monthly account against defendant for castings to the plaintiff bank, and sending the bill so assigned to the purchasing agent of defendant, who returned the same with a signed statement acknowledging the receipt of such account against defendant, stating amount, date and the fact of its assignment. The writing further stated: "The net amount thereof, after deducting cost of transportation and other reasonable charges, to be paid to said bank when adjusted and due." At the same time plaintiff's assignor was purchasing from defend-

ant scrap brass, and, at the time said assignor made a voluntary assignment, defendant's accounts for scrap brass amounted to one half of the bills for castings. In an action on such assigned accounts defendant sought to set off the value of the scrap brass against such accounts, and offered to allow judgment to be taken for the balance. *Held*, that the promise to pay the net amount of such accounts "after deducting cost of transportation and other reasonable charges," excluded other deductions. *Batavian Bank v. M., St. P. & S. S. M. R. Co.* 389

2. In such case, the words "other reasonable charges" do not refer to a setoff for the scrap brass sold. *Ibid.*

3. In such case, the evidence of a long-continued course of business dealing in regard to such accounts by the purchasing agent of defendant, is *held* sufficient to create an apparent authority in the purchasing agent to make such agreement, on which plaintiff had a right to rely, notwithstanding the by-laws of the defendant conferred no such power. *Ibid.*

SETTLEMENT. See BASTARDY, 5, 7–10. COMPROMISE AND SETTLEMENT.

SHIPPING. See ADMIRALTY.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 9.

SIGNATURES.

1. In an action of foreclosure based on a note and mortgage,—where the defendant has in his verified answer denied their execution, and alleged that the instruments are forgeries and not signed by him,—under sec. 4192, Stats. 1898, the burden of proof is on the plaintiff to prove the signature. *Ellis v. Hof*, 201

2. In an action of foreclosure based on a note and mortgage, alleged to be forgeries, the evidence is *held* to support a finding that the signatures affixed were not the genuine signatures of defendant. *Ibid.*

SPECIAL VERDICT. See APPEAL, 1. TRIAL, 22–24.

SPECIFIC PERFORMANCE.

See FRAUDS, STATUTE OF, 1.

1. When the right sought by specific performance has never been refused, no decree is necessary, and the dismissal of the complaint is proper. *Chicago, M. & St. P. R. Co. v. H. W. Wright Lumber Co.* 46

2. Where the only arrangement as to the price of lands was that the purchaser should pay what the land was worth, and that if the parties could not agree, the price was to be settled by arbitration, one essential of the contract is left wholly uncertain, and it will not be specifically enforced. *Schneider v. Reed*, 488

3. An agreement to arbitrate will not be specifically enforced. *Ibid.*

4. A court of equity will not take jurisdiction to compel specific performance of a verbal agreement to make a valid contract of guaranty where it would not reform such a contract, through mutual mistake defectively reduced to writing. *Rowell v. Smith*, 510

SPUR TRACKS. See RAILROADS, 1.

STANDARD POLICY. See INSURANCE, 11, 12.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF. LANDLORD AND TENANT, 2. SPECIFIC PERFORMANCE, 4.

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" 4494 - - 31, 32, 34, 35
" 4926 - - - - 470
" 4972 - - - - 545

STIPULATED PREMIUM. See INSURANCE, 16.

STREET RAILWAY BONDS. See TRUSTS AND TRUSTEES, 4.

STREET RAILWAYS

Injuries to persons on or near tracks.

1. Due care in approaching a railway track can be satisfied only by full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril. *Goldmann v. Milwaukee E. R. & L. Co.* 168
2. A traveler crossing a railway track cannot rely on any assumption that a car is moving at a reasonable, or any other, rate of speed, where he has opportunity to observe the contrary. *Ibid.*

3. No right of way can be said to exist in favor of a traveler crossing a railway track when, as established by the result, some diminution of the speed of the car was necessary to enable him to pass in safety. *Ibid.*

4. Under the facts, stated in the opinion, plaintiff was *held* guilty of contributory negligence precluding recovery. *Ibid.*

5. In an action against a street railway company for personal injuries, under the facts, stated in the opinion, it was not error to allow a witness, called by defendant, who was familiar with wood wagons in common use, to testify to the height of an ordinary wood wagon. Such testimony was the best evidence the defendant could give under the circumstances. *Lightfoot v. Winnebago Traction Co.* 479

6. In such case, it is not prejudicial error for the trial judge to remark, in overruling an objection to a question calling for the height of a wood wagon by actual measurement, that the fact that it was a wood wagon was the only information the jury had gotten from the testimony. *Ibid.*

7. In an action for personal injuries received by collision with a street car, instructions to the jury on the duties of a traveler, stated in the opinion, are *held* to have informed the jury that the defendant was only responsible for the misconduct of its motorman, and not for the misconduct of others over whom it had no control. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 2–5, 9.

SUBCONTRACTORS. See MECHANICS' LIENS, 5, 6.

SUBROGATION. See LIFE ESTATES, 3–5.

SUNDAY.

1. Where a contract is void because executed on Sunday, acts of subsequent recognition do not constitute ratification of the original contract. Such contract is absolutely void and incapable of ratification. *Sherry v. Madler,* 621

2. Where a contract to build a house is void because executed on Sunday, and the house has been built, the contractor, on proper pleadings, may prove either that a new contract was made, or, in the absence of such contract, the reasonable value of the labor and materials which went into the house. *Ibid.*

SUPERVISOR OF ASSESSMENTS. See TAXATION, 2. WITNESSES, 1.

SURETIES. See EXECUTORS AND ADMINISTRATORS, 6, 7. PRINCIPAL AND SURETY.

SURPLUSAGE. See INDICTMENT AND INFORMATION.

SURRENDER. See CORPORATIONS, 11. LANDLORD AND TENANT, 2. VENDOR AND PURCHASER, 1, 2.

TAXATION.

Exemptions: Railroads.

1. In an action to set aside certain taxes levied on plaintiff's lands, it appeared, among other things, that in a former action between the same parties and involving, in part, the same lands, the court concluded as matter of law that each tract was exempt from taxation. *Held,* that so long as the facts as to the use of the parcels remained the same, the question as to their

being exempt from taxation was settled between the parties and could not be reopened. *Chicago, M. & St. P. R. Co. v. Racine,* 102

2. In such case, where, in reply to the court's question, defendant stated it had no proof to offer as to *a changed condition or difference* of use of *any parcel* included in the *complaint,* it was not error to sustain plaintiff's objection to the introduction of any evidence by defendant. *Ibid.*

3. In such case, the court was justified in assuming from such statement of defendant, that as to an additional parcel, not included in the former action, it had no additional proof to offer. *Ibid.*

Assessment: Supervisor of assessments.

4. The supervisor of assessments is not authorized to make assessments, or substitute his judgment for that of the assessor. *State ex rel. N. C. Foster Lumber Co. v. Williams,* 61

Same: Board of review: Valuation: Evidence. See CERTIORARI, 1, 2.

5. On *certiorari* to a board of review, in the absence of evidence to impeach it, the assessor's valuation is presumed to be correct, and, upon the evidence produced to support or overcome that presumption, no mistake or error of the board, honestly made in deciding thereon according to their judgment, warrants judicial review of the decision. *State ex rel. N. C. Foster Lumber Co. v. Williams,* 61

6. In such case, the court must look into the evidence far enough to see whether in any reasonable view thereof, in the light of correct rules of law, it furnished a substantial basis for the board's action, and, having discovered that, the court has exercised its legitimate function in respect thereto. *Ibid.*

7. Where the trial court on *certiorari* to a board of review has passed adversely to the contention of relator, on appeal the want of legitimate basis in the evidence for the board's decision must appear very clearly and satisfactorily, although the decision may seem clearly against the great preponderance of the evidence. *Ibid.*

8. In proceedings before a board of review to reduce the assessor's assessment, the board is not bound to accept as true the evidence upon one side or that of the other, but may, in the exercise of its judgment, disregard the evidence on both sides, and fix a valuation between the two extremes. *Ibid.*

9. In proceedings before a board of review to reduce the assessor's valuations, one item was a sawmill. The evidence of the owner bore mainly on what the sawmill property was worth to disorganize it and dispose of its parts. The testimony chiefly relied upon by the board to support the assessor's valuation was what the property, as an entirety, and as a going concern, would ordinarily sell for at private sale, assuming that a buyer, with the same opportunity for the use of the mill as the present owner, was at hand and had the means to buy it. *Held,* that the evidence to support the assessor's valuation was much nearer the statutory basis prescribed by sec. 1052, Stats. 1898, i. e., the full value that could ordinarily be obtained for the property at private sale. *Ibid.*

10. In proceedings before a board of review to reduce the assessor's valuation, one item was a stock of lumber. The result testified

to by a witness produced by the relator and witnesses produced by the assessor varied several million feet, but neither of the results was more than an estimate. *Held*, that while the method of estimation adopted by the relator's witness appeared better calculated to reach a correct result, it could not be said that the method adopted by the assessor was so unlikely to reach an approximately correct result that the evidence thereof was not entitled to consideration, and hence the board was not without warrant in reaching its conclusion. *Ibid.*

11. In proceedings before a board of review to reduce the assessor's valuation, one item was the value of relator's sawlogs. Relator estimated the amount thereof on May 1, by taking from the log stock secured for the season, the amount of lumber manufactured therefrom, on an estimated cut of the mill per day. Relator did not furnish any evidence of the lumber actually cut out of the logs, nor any evidence of how the scale of the lumber compared with the log scale. The assessor made his valuation on an estimate from inspection and statements of the relator's agents. *Held*, that the board were not entirely without warrant in reaching the conclusion which they did, and that their valuation should stand. *Ibid.*

12. Where no affidavit fixing the amount of relator's property was delivered to the assessor until long after the assessment roll had been delivered to the board of review, the true assessment, which is *prima facie* correct, is that fixed by the assessor, which relator has no right to have reduced except upon evidence reasonably tending to show that it was excessive. *State ex rel. Foster v. Williams*, 73

13. Where evidence offered to show an excessive assessment is that of the taxpayer's own agent, it is to be construed most strongly against him. *Ibid.*

14. Relator was assessed by the assessor for moneys, accounts, credits, bonds, notes, and other securities, after deducting *bona fide* debts, $5,000. *Held*, that the evidence, stated in the opinion, tended, though not conclusively, to establish that the original assessment was wrong, and justified the board of review in making some reduction. *Ibid.*

15. Under sec. 2, ch. 284, Laws of 1903, if the taxpayer objecting to the assessor's assessment refuses in any degree to answer fully such inquiries as may tend to develop what property he deems not liable to assessment, and as may test the accuracy and credibility of the statements he volunteers, the statute denies him the benefit of the statement he chooses to make. *Ibid.*

16. On *certiorari* to review the action of a board of review in dealing with relator's assessment of personal property, the testimony of relator's agent is *held* to warrant a denial of relief in deference to sec. 2, ch. 284, Laws of 1903. *Ibid.*

17. In such case, where judgment of affirmance of the action of the board of review was warranted by the record, that action will not be disturbed because the trial court's reasons would have resulted in dismissal. *Ibid.*

Disposition of taxes collected.

18. When a county treasurer, in his official capacity, has moneys in his hands belonging to a town, representing the proceeds of delinquent taxes returned by the town and afterwards collected,

the remedy for its collection is not against the treasurer but by action against the county as for money had and received. *Newbold v. Douglass*, 28.

[19. Whether in a proper action by a town against a county for delinquent taxes returned by the town, and afterwards collected, the five per cent. collection fees under sec. 1112, Stats. 1898, the five per cent. interest under sec. 1129, the twenty-five cents advertising fee on each parcel under sec. 1133, the twenty-five cents for a certificate fee on each certificate of sale under sec. 1196, and the fifteen per cent. interest on each certificate of sale of lands bid in by the county from the date of sale to the date of assignment or redemption under secs. 1165 and 1192, are properly allowable to the town, not determined.] *Ibid.*

TAX TITLES.

See EJECTMENT, 1, 4–7.

1. Under secs. 1165, 1166, Stats. 1898, the right of redemption given to a minor is not impaired by the fact that a tax deed has been issued before the actual redemption. *Hoffman v. Peterson*, 632

2. The words "other person" in sec. 1165, Stats. 1898, enable those whose rights would be directly prejudiced by the absolutism of the tax title to redeem therefrom, though they may be neither owners nor occupants. *Ibid.*

3. In an action for trespass for wrongfully cutting timber, plaintiff's title was based on a tax deed issued in 1896 on the tax sale of 1893. At those dates the property belonged to a minor who attained his majority April 21, 1901. The minor conveyed the premises by warranty deed to defendants in November, 1901, and redeemed from such tax sale March 8, 1902. *Held*, that the right of redemption existed in such minor when he exercised it. *Ibid.*

4. Where lands are vacant and unoccupied it is not necessary for one redeeming, after a tax deed has been recorded, to commence an action to set aside that deed before he can exercise his rights of ownership. *Ibid.*

5. In such case, the tax deed, upon the act of redemption within the right preserved by law, becomes wholly void and of no effect. *Ibid.*

6. Under sec. 1189, Stats. 1898, there is nothing after redemption, within the rights preserved by law, which precludes the holder of the legal title from regaining actual possession, either by taking it in the case of vacant and unoccupied land, or by bringing action, within the period of the general statutes of limitation, in case the tax-deed claimant is in actual occupancy. *Ibid.*

7. Although no action on the part of an owner who has lawfully redeemed from a tax sale is necessary to enforce possession and ownership, the act of the holder of a recorded tax deed in bringing an action of trespass against the owner, basing his right on such tax deed, constitutes such an apparent cloud, and such setting up of a claim to the land, as enables such owner by counterclaim in that action to have the title quieted in him. *Ibid.*

TENDER. See REPLEVIN. VENDOR AND PURCHASER, 1.

TITLE. See SALES, 6, 7.

TOWNS. See TAXATION, 18, 19.

TRANSACTIONS WITH DECEDENTS. See WITNESSES, 5.

TRESPASS.

See CRIMINAL LAW, 4. DEAD BODIES. NAVIGABLE WATERS, 2. TAX TITLES, 3, 7.

Plaintiff and defendant owned, occupied and used lands separated by a stream. The holding of each was enclosed on all sides except along that stream, and no proceedings were ever taken by either for the establishment and partition of the line for a division fence between their holdings. Plaintiff's cattle escaped from his pasture to that of defendant's on the opposite side of the stream, where they were distrained, and plaintiff thereupon brought action to recover possession of the cattle. *Held*, under secs. 1391, 1395, Stats. 1898, that compliance with such statutes was a condition precedent to damages for a trespass, such as the defendant sought to redress by distraining the cattle. *Walls v. Cunningham*, 346

TRIAL.

Preliminary proceedings. See EVIDENCE, 18–20.

Course and conduct of trial in general. See ACTION. APPEAL, 20–34. EJECTMENT, 7. QUO WARRANTO. TAXATION, 5–7. VENDOR AND PURCHASER, 4–7.

Reception of evidence. See APPEAL, 6–8, 21, 22, 24, 26–33. CUSTOM AND USAGE, 1, 2. DESCENT AND DISTRIBUTION, 4, 5. EVIDENCE, 12. INSURANCE, 8, 13. MECHANICS' LIENS, 8, 9. NEGLIGENCE, 3–7. SALES, 8. STREET RAILWAYS, 5, 6. TAXATION, 4, 5. TRIAL, 25–27. VENDOR AND PURCHASER, 4–7.

Taking case from jury. See APPEAL, 6, 8–10. MASTER AND SERVANT, 1–3, 5. STREET RAILWAYS, 6. TRIAL, 3, 17–21.

Instructions to jury: Necessity, form, requisites and sufficiency. See ADVERSE POSSESSION, 4. APPEAL, 4, 24, 34. ASSAULT AND BATTERY, 5–7, 10, 11. EVIDENCE, 13. NEGLIGENCE, 13. SALES, 7. STREET RAILWAYS, 7.

1. Upon the question whether the vendor knew, at the time of the sale, the purpose for which potatoes were purchased, it was proper to instruct the jury that knowledge of the vendor's agent who made the sale was imputable to the vendor, and language, in that connection, to the effect that acts, statements, and knowledge of the agent when the contract was made were binding upon the vendor, is *held* not likely to have misled the jury to understand that the vendor was bound by unauthorized warranties made by the agent. *Northern Supply Co. v. Wangard*, 1

2. An instruction permitting the jury to apply their own knowledge and experience in determining what the evidence established upon a question of fact, was erroneous. *Ibid.*

3. Upon the question whether a person of ordinary intelligence in the exercise of ordinary care, by inspecting potatoes after their

arrival and before their removal from the car, could have determined whether they were of the kind and quality agreed upon, an instruction that "he would not be required to look at the whole mass in the car or look at them other than in a fair and reasonable way," etc., is *held* to invade the province of the jury. *Ibid.*

4. Where, in an action for personal injuries, the court carefully defined proximate cause, and instructed the jury that in order to find that the negligence of the defendant was the proximate cause they must be satisfied of the necessary facts by a fair preponderance of the evidence, it is not error to refuse a requested instruction expressing simply the converse of such instruction. *Nagle v. Hake,* 256

5. In an action for personal injuries, where the court had already defined ordinary care as "such care as the mass or majority of mankind exercise under the same or similar circumstances," an instruction to the jury (stated in the opinion) is not erroneous because it requires of defendant the exercise of more than ordinary care. *Ibid.*

6. In an action for negligently permitting fire to escape from defendant's premises and communicate to plaintiff's building whereby it was destroyed, in connection with a question of the special verdict as to whether defendant's acts were the proximate cause of plaintiff's loss, instructions, stated in the opinion, are *held* erroneous in that they permitted the jury to use as a standard their ideal of what the defendant ought to have anticipated, instead of that which an ordinarily prudent person, under like circumstances, would have anticipated. *Knickel v. C. & N. W. R. Co.* 327

7. Such error is, however, cured by the submission of another question of the special verdict, in which the jury were given the correct standard and under which they found the element of anticipation. *Ibid.*

8. Instructions to the jury, commenting on the items of testimony, considered, and *held* not to violate the rule that in so doing all the essential facts on both sides should be covered. *Sullivan v. Mauston Milling Co.* 360

9. An instruction to the jury with reference to the allowance of interest on the amount found due, stated in the opinion, is *held* erroneous, since interest does not run until a demand has been made sufficiently specific to inform the debtor of the claim made and to enable him to ascertain what amount, under the circumstances, he ought to pay. *Lowe v. Ring,* 370

10. An instruction to the jury, that the conduct of the officers and agents of a corporation in respect to the payment of a salary to the president for his official services would bind it under the same circumstances as an individual, is erroneous. *Ibid.*

11. It is error to instruct the jury that the burden of proof is on both parties litigant at the same time. *State ex rel. Leonard v. Rosenthal,* 442

12. An instruction to the jury: "In determining where the preponderance or weight of the evidence lies, *that is not to be determined* by the number of witnesses on either side, or by the number of witnesses on any particular material point," while erroneous, is *held* not to be misleading, because followed by the

further and correct instruction: "But that evidence is said to preponderate or outweigh on any given question which is the most satisfying or the most convincing to your minds after you have thoroughly and carefully considered it. It is for you to determine the credit and weight to be given to each witness in the case." *Garske v. Ridgeville,* 503

13. An instruction to the jury, in effect, that they must weigh and consider much, if not most, of the testimony that has been introduced, criticised, though *held* not so indefinite as to constitute grounds for reversal. *Roberts v. McWatty,* 598

Same: Requests for instructions. See APPEAL, 5. TRIAL, 4.

14. In an action for personal injuries caused by the negligence of defendant town in failing to keep its highways in repair, no error can be predicated upon refusing a requested instruction: "If the plaintiff placed himself in a position of known danger, when he might have avoided it, and while there received the injury of which he complains, he was guilty of negligence, although the danger may have been caused by the negligence of the town authorities," the court having instructed the jury that if plaintiff failed to exercise such care as the great mass of mankind ordinarily exercise under the same or similar circumstances, he could not recover. *Lynch v. Waldwick,* 351

15. Such requested instruction is incomplete and inaccurate in that it lacks two important qualifications essential to its accuracy: First, that the injury did actually result from the conduct of plaintiff, and, secondly, that an ordinarily prudent man should, under all the circumstances, have reasonably anticipated some injury as the result of such conduct. *Ibid.*

16. In an action for personal injuries it is not error to refuse a requested instruction, which consisted in stating the requisite conduct of a person "in the face of unexpected and deadly danger" where there was evidence tending to prove that such danger was created by such person. *Lightfoot v. Winnebago Traction Co.* 479

Verdict: Perversity: Remission of excess by court. See NEW TRIAL.

17. In case of a verdict which is fatally excessive, either from perversity or other cause, whether dealt with in the trial or appellate jurisdiction and whether the excess is susceptible of determination by computation or not, the right to recover being clear, it is proper to so provide that one party to the litigation, at his option, whether the other consents or not, may terminate the controversy by a judgment for less than the amount named by the jury. *Heimlich v. Tabor,* 565

18. In providing, as indicated, the court cannot legitimately invade the right of trial by jury by substituting its judgment on the evidence, as to the proper amount to be awarded plaintiff, for the judgment of a jury. *Ibid.*

19. The only proper basis for determining the correct amount of a verdict which is fatally defective, is the probable finding by an impartial jury, reasonable doubts being resolved against the party to whom the option is given to take or submit to judgment. *Ibid.*

20. The practice, where the only error in a verdict is that it is fatally excessive, of naming a sum for which judgment may be rendered at the option of one of the parties, is highly bene-

ficial in the administration of justice, and does not prejudicially, if at all, violate the rights of either party, if grounded upon the proper basis. *Ibid.*

21. Where the option is given to the plaintiff to take judgment for a less sum than that found by the jury and thus avoid a new trial, such sum should be placed as low as an impartial jury on the evidence would probably name, and where the option is given to the defendant to submit to judgment and avoid a new trial, regardless of the attitude of the plaintiff, the sum named should be as large as an impartial jury on the evidence would probably find. *Ibid.*

Special verdict. See APPEAL, 1. DAMAGES, 1, 2. TRIAL, 6, 7.

22. A question submitted in a special verdict, "Were all the potatoes furnished by the plaintiff to the defendant of the kind and quality agreed to be furnished?" was not multifarious. *Northern Supply Co. v. Wangard,* 1

23. In framing a special verdict, it is not to be expected that the court will attempt to embody all the facts and circumstances as in a hypothetical question to an expert; hence, where fire had originated by sparks from defendant's locomotive, in submitting to a jury a question of a special verdict, it is not error to refuse to incorporate in such question, after the word "locomotive," the words "properly equipped with proper spark-arresting machinery in good condition." *Knickel v. C. & N. W. R. Co.* 327

24. On the trial of an issue on a claim for compensation for the services of a president of a banking corporation, the court submitted as part of a special verdict this question: "Was there a contract, express or implied, between R. and the bank, that R. should receive a salary from the bank as president," which was answered by the jury "Yes." *Held,* that the question was faulty for duplicity, and fatally defective for uncertainty. *Lowe v. Ring,* 370

Verdict: When mistake of jurors can be shown.

25. The rule which excludes jurors' testimony as to their conduct in the proceedings involved in reaching and agreeing upon the verdict, does not exclude their evidence as to what really was the verdict agreed upon in order to prove that it has not been correctly expressed. *Wolfgram v. Schoepke,* 19

26. The rule which does not allow jurors to impeach their verdict, applies to the agreement which the jury reached, and not to the written paper filed, intended to express that agreement. *Ibid.*

27. Where, in answering a question of a special verdict: Was plaintiff guilty of any want of ordinary care which contributed to the injury he received? the jury inserted the answer "Yes," the trial court may properly receive and consider the affidavits of all the jurors, to the effect that they all agreed that the plaintiff was not guilty of any want of ordinary care, and that the insertion of the answer "Yes" instead of "No" was a mistake, and justifies the exercise of discretion in awarding a new trial. *Ibid.*

28. In such case, plaintiff having appealed to the court's discretion, it is error to grant a new trial without the imposition of terms. *Ibid.*

Trial by court: Findings of fact. See APPEAL, 13–16, 23, 25, 28. MORTGAGES, 4–6.

29. Under sec. 2863, Stats. 1898, only the ultimate conclusions of fact drawn from the evidentiary facts and essential to the settlement of the conflicting claims of the parties should be stated, and omnibus findings to the effect that all the material allegations of the complant are proven, and that the allegations of the answer inconsistent therewith are unproven, fail to respond to the mandate of the statute. *Farmer v. St. Croix P. Co.* 117 Wis. 76, and other cases, followed. *McKenzie v. Haines,* 557

30. Under sec. 2863, Stats. 1898, when an action is tried by the court without a jury, it is error to grant a motion of nonsuit, and to thereon award judgment dismissing the complaint. *Sliter v. Carpenter,* 578

TRUST COMPANIES. See TRUSTS AND TRUSTEES, 3.

TRUSTS AND TRUSTEES.

See BASTARDY, 3, 4, 10. CORPORATIONS, 1–7. PROPERTY. WILLS, 3–5.

Management and disposal of trust property: Investments: Income.

1. Except as modified by statute, trustees cannot be relieved from liability for the investment of trust funds in other than governmental or real-estate securities. *In re Allis's Estate,* 223

2. Ch. 317, Laws of 1903, is *held* to have been enacted in recognition of the law as declared by the supreme court, and that investments in securities, other than those specified in the act, do not come within the protection of the law. *Ibid.*

3. Sec. 1791*h*, Stats. 1898, giving a trust company the right, in its discretion, to invest trust funds in certain specified securities, "or in such real or personal securities as they may deem proper," relates to the investment of the funds owned by the trust company in its corporate capacity, and does not include money held by it in trust as executor, administrator, or any other trust relation. *Ibid.*

4. Under a will giving trustees power as to investments, stated in the opinion, it is *held* that the trustees in purchasing railway and street railway bonds, acted within the authority and direction as expressed in such will, and that the court properly approved them. *Ibid.*

5. Where in the investment of trust funds, the income of which is to be paid to beneficiaries during the life of the trust, the principal to be paid to others on its termination, the trustee bought securities at a premium, the trustee should take from the annual income such portion as will, under established rules and tables, repay the *corpus* of the estate the amount paid therefrom in purchasing the securities. *Ibid.*

UNDER-CROSSINGS. See RAILROADS, 2–5.

UNLAWFUL COMBINATIONS. See MUNICIPAL CORPORATIONS, 8.

USAGE. See CUSTOM AND USAGE.

VALUE. See TAXATION, 5–17.

VENDOR AND PURCHASER.

Rights of lien claimant. See MECHANICS' LIENS, 4.

Rescission by purchaser.

1. One who had contracted for lands, but after full payment and demand had failed to receive a conveyance, cannot maintain an action at law for the purchase price, where it appears that a subsequent tender of a deed had been refused merely because it was too late, and that, prior to the commencement of the action, he had made no offer to surrender the equitable rights which he had received by force of the land contract and payment of the purchase price. *Phelps v. Mineral Springs Heights Co.* 253
2. In such case, the evidence examined, and *held* not to disclose any declaration or conduct of the defendant constituting a notification that it would not accept a surrender of the land contract if tendered. *Ibid.*

Remedies of purchaser: Improvements.

3. Where a purchaser goes into possession of lands, and, in good faith, makes extensive improvements under an unenforcible arrangement with the vendor, and the vendor refuses to complete the agreement, the purchaser is entitled, in equity, to compensation for the amount which his improvements have added to the value of the land, less the rents and profits properly chargeable against him while in possession. *Schneider v. Reed,* 488
4. In such case, it should be determined how much the improvements have enhanced the value of the land, and the reasonable rental value, irrespective of buildings during the vendee's possession, and the balance, in favor of the vendee, if any, adjudged an equitable lien on the premises. *Ibid.*
5. In such case, the vendor should be allowed to redeem from such equitable lien, by payment of the amount thereof within a reasonable time, to be fixed by the judgment, with interest from the date of the judgment, but with no deduction for rents and profits accruing after the entry of the judgment. *Ibid.*
6. In such a case, where the issue was raised in an action to foreclose a mortgage lien existing on the premises prior to such purchase, the judgment of foreclosure should provide that, in case it becomes necessary to sell the purchased parcel, the same should be sold free from such lien, the equitable lien to be a lien on the surplus, if any, arising from the sale, which surplus should be brought into court for disposition by its order. *Ibid.*
7. Where a purchaser of land under an unenforcible agreement in good faith makes valuable improvements, and thereby acquires an equitable lien, such land being subject to a prior mortgage, and in an action to foreclose such mortgage, issues raised between such purchaser and the owner of the equity of redemption are adjudicated, whereby the amount of such equitable lien is fixed, the judgment of foreclosure should provide for some short period within which such equitable lien may be redeemed, and, in case of failure to redeem, or on failure to cause a foreclosure sale within such period, that the owner of the equitable lien may bring an action for strict foreclosure of such lien, subject, however, to the prior mortgage lien. *Ibid.*

VERDICT. See ADVERSE POSSESSION, 4. SALES, 3. TRIAL, 17–28.

VESTED RIGHTS. See INSURANCE, 14, 15. MUNICIPAL CORPORATIONS, 1. SALES, 6–8. WILLS, 4.

VICE-PRINCIPAL. See MASTER AND SERVANT, 4.

VOLUNTARY SEPARATION. See BASTARDY, 9.

VOTERS. See EVIDENCE, 15, 16. QUO WARRANTO. WITNESSES, 9.

WAIVER.
Of exceptions. See APPEAL, 12, 13.
Of statutory conditions. See BASTARDY, 8.
Of remedy. See ELECTION OF REMEDIES, 6.
Of objection to pleading. See PLEADING, 2, 5.

WARRANTY. See SALES, 1, 2, 9–11. TRIAL, 1.

WATERS AND WATERCOURSES. See BOUNDARIES. NAVIGABLE WATERS. TRESPASS.

WIDOWS. See PARTITION.

WILLS.

Construction: Rights of legatees. See TRUSTS AND TRUSTEES, 4.

1. A testator devised certain of his estate to his wife, and, after certain annuities, all the "residue" to his wife, two brothers and an adopted son, share and share alike, to each an undivided one-fourth share thereof. He further provided that in case his adopted son should not attain twenty-one years his share should be equally divided between the wife and two brothers. The annuitants and the wife predeceased the testator, who afterwards remarried, the second wife surviving him. *Held*, that it could not be said that the testator used the word "residue" in his will in other than its usual and legal meaning, from which is excluded the dominant widow's right, and that the residue was properly ascertained by deducting from the general estate the debts and the amount necessary to satisfy the widow. *In re Bradley's Will*, 186

2. In such case, the lower court properly distributed such "residue," one-fourth each to the brothers and adopted son as legacies under the will. The remaining fourth, by lapse of the bequest thereof to the first wife, became intestate property and was properly assigned to the adopted son under the laws of descent. *Ibid.*

Same: Estates in trust: Right to terminate.

3. Unless so completely thwarted by rules of law as to accomplish no possible purpose, it is the duty of courts to enforce the right of an owner of property to control its use and management after his death, as by directing that specific real estate be preserved as such within a limited time, and the income paid to beneficiaries. *Patton v. Patrick*, 218

4. In the progress of the settlement of an estate, wherein the will of the testator provided that the income of specific real estate should be collected by trustees and paid to his children at stated intervals, and that such real estate should not be sold until the happening of a certain event, or a fixed period of time, and then to be converted and divided, it was adjudged that the children became vested with their respective shares of the estate immediately upon the testator's death. *Held*, under

sec. 2089, Stats. 1898, that the children could not by transferring their vested rights in the remainders, together with their shares in the income, render impossible the purpose of the testator, and present a situation where the continuance of the trust could be terminated. *Ibid.*

5. In such case, where, by reason of the peculiar situation of the land—leased by the testator before his death for a long term to those who had constructed buildings thereon, and who were also charged with the duty of paying the taxes—there remains but the single act of enforcing performance by the lessees of their duty to pay rent and taxes, the trust is, nevertheless, not an executed one, and is valid by virtue of the active duties imposed upon the trustee to receive rents and apply them to the use of the children. *Ibid.*

Rights of devisees and legatees. See DESCENT AND DISTRIBUTION, 1–4.

WITNESSES.

Attendance and production of documents. See EVIDENCE, 18–20.

Competency: Capacity and qualification. See CUSTOM AND USAGE, 1, 2. EVIDENCE, 13, 16. HIGHWAYS, 5. STREET RAILWAYS, 5. TRIAL, 25–27.

1. A supervisor of assessments is a competent witness to give testimony before a board of review, and the fact that in giving his testimony he was in the attitude of supporting his own judgment, recorded in the assessment roll, goes to the weight of his testimony, but not its competency. *State ex rel. N. C. Foster Lumber Co. v. Williams,* 61

2. Where a married woman is a party in the capacity of an executrix, it is not error to exclude the testimony of her husband, who was offered as a witness generally in the case and not as her agent. *Currie v. Michie,* 120

3. Where the witness who drew a notice had made a memorandum in respect to it, the mere fact that he did not have the memorandum present in court when giving his testimony, does not prevent him from testifying to such facts as he remembers. *Garske v. Ridgeville,* 503

4. The mere fact that such witness had given a somewhat different version of the contents of such notice in a deposition, taken several months before the trial, does not prevent him from giving oral testimony as to its contents on the trial. *Ibid.*

Same: Transactions and communications with persons subsequently deceased.

5. Where a party is called under sec. 4068, Stats. 1898, as an adverse witness and examined as to transactions and communications had with a person since deceased, in respect to such matters, the examination opens the door to the admission of the testimony of the adverse party. *Currie v. Michie,* 120

Examination and cross-examination. See APPEAL, 25, 26, 33. ASSAULT AND BATTERY, 1. NEGLIGENCE, 3, 7. TAXATION, 15. WITNESSES, 11.

6. Where plaintiff's witness on his direct examination has not testified on a given subject, and it does not appear that any defense on that subject is involved in the action, it is not error

to sustain an objection to the cross-examination of the witness on that subject. *Johnston v. Charles Abresch Co.* 130

7. Where, in an action for the price of grain, the defense was that the grain had been stored instead of purchased, and the defendant's manager had testified that it was in the habit of storing grain for others, it is proper to cross-examine such manager as to former transactions with the plaintiff and others. *Sullivan v. Mauston Milling Co.* 360

8. The use of cross-examination is not a mere privilege subject to discretionary judicial authority,—it is a right. *Illinois Steel Co. v. Jeka,* 419

9. In an action to test defendant's right to an elective office, a witness for relator, after having testified to making extensive investigations after the election as to the residence of a number of alleged illegal voters, in the course of which he went to another city, was asked on cross-examination whether relator did not pay him for his time, and also the expenses of his trip. *Held,* that it was error to sustain objections to such questions, since it is competent on cross-examination to show the relations existing between the witness and the parties to the action, as bearing on his credibility. *State ex rel. Leonard v. Rosenthal,* 442

Credibility: Impeachment: Character. See APPEAL, 32. TAXATION, 13. WITNESSES, 9.

10. While plaintiff's motive in bringing suit can in no way affect his cause of action, it is not error to compel him to answer questions designed to show what prompted him to sue defendant, since such inquiry is calculated to show his bias and prejudice, and thus discredit him as a witness. *Lowe v. Ring,* 107

11. Proof of particular instances of misconduct of a party, as evidence of character, is admissible only upon cross-examination for the purpose of discrediting him as a witness, and in the exceptional case of an indecent assault upon a female. *Ibid.*

WORDS AND PHRASES.
Bastardy proceeding. See BASTARDY, 6.
Claims, in contract. See COMPROMISE AND SETTLEMENT, 2.
Due care. See NEGLIGENCE, 9, 10. STREET RAILWAYS, 1.
Good, in contract. See SALES, 2.
Gross negligence. See NEGLIGENCE, 15.
Lumber and timber, in statute. See LIENS, 4.
Mortgage. See MORTGAGES, 1.
Negligence. See NEGLIGENCE, 14, 15.
Net amount, in contract. See SETOFF, 1.
Other person, in statute. See TAX TITLES, 2.
Other reasonable charges, in contract. See SETOFF, 2.
Party aggrieved, in statute. See APPEAL, 2.
Privity. See JUDGMENTS, 2.
Property. See PROPERTY.
Residue, in will. See WILLS, 1, 2.
Slabs. See LIENS, 4.
Without recourse, in indorsement. See BILLS AND NOTES, 7.

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